(2) Supreme Court, U.S.
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No.

IN THE
# Supreme Court of the United States

JEROLD DANIEL FRIEDMAN,
Also Known as JERRY FRIEDMAN,
*Petitioner,*

*v.*

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California Partnership; KAISER FOUNDATION HOSPITALS, a California Corporation; and KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation,
*Respondents.*

**On Petition For Writ Of Certiorari To The Court of Appeals of the State of California, Second Appellate District, Division Five**

## APPENDIX (VOLUME 1 OF 2) TO PETITION FOR WRIT OF CERTIORARI

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# APPENDIX

## OPINION OF COURT OF APPEAL

Filed 9/13/02

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

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| JEROLD DANIEL FRIEDMAN,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al.,<br><br>Defendants and Respondents. | B150017<br><br>(Super. Ct. No. BC224249) |

* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I, IIA, IIB1-IIB6, and III of this opinion are certified for publication. The remainder of the opinion is not to be published.

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald M. Sohigian and Cesar C. Sarmiento, Judges. Affirmed.

Myer Law Firm and Scott D. Myer for Plaintiff and Appellant.

Sefarth Shaw, F. Scott Page and Debbie L. Freedman for Defendants and Respondents.

## I. INTRODUCTION

Jerold Daniel Friedman (plaintiff) appeals from a judgment entered after the general demurrers of Southern California Permanente Medical Group, Kaiser Foundation Hospitals, and Kaiser Foundation Health Plan, Inc. (defendants) were sustained without leave to amend. In the published portion of this opinion, we resolve the question of whether veganism is a "religious creed" within the meaning of the California Fair Employment and Housing Act (FEHA), Government Code[1] section 12940. We conclude veganism is not a "religious creed" within the meaning of the FEHA. Accordingly, we affirm the judgment.

## II. DISCUSSION

### A. Standard of Review

Our Supreme Court has set forth the standard of review we must apply on appeal from a judgment following an order sustaining a demurrer without leave to amend as follows: "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of

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[1] All further statutory references are to the Government Code except where otherwise noted.

contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. The Complaint's Allegations of Religious Creed Discrimination

The trial court sustained defendants' demurrers without leave to amend to plaintiff's first through third causes of action of his original complaint for religious creed discrimination and retaliation in violation of the FEHA. The trial court concluded veganism was not a religious creed within the meaning of the FEHA. In his original complaint, plaintiff alleged as follows. He is a strict vegan. Further, he alleged: "As a strict Vegan, [plaintiff] fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [plaintiff] bases his foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, and his beliefs [*sic*], [plaintiff] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [plaintiff] cannot wear leather, silk or any other material which comes from animals, and cannot use any products such as household cleansers, soap or toothpaste which have been tested for human safety on animals or derive

any of their ingredients from animals. This belief system[] guides the way that he lives his life. [Plaintiff's] beliefs are spiritual in nature and set a course for his entire way of life; he would disregard elementary self-interest in preference to transgressing these tenets. [Plaintiff] holds these beliefs with the strength of traditional religious views, and has lived in accordance with his beliefs for over nine (9) years. As an example of the religious conviction that [plaintiff] holds in his Vegan beliefs, [plaintiff] has even been arrested for civil disobedience actions at animal rights demonstrations. This Vegan belief system guides the way that [plaintiff] lives his life. These are sincere and meaningful beliefs which occupy a place in [plaintiff's] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths."

Plaintiff was hired by a temporary agency to work for defendants as a computer contractor. He worked at a pharmaceutical warehouse owned by defendants. He had no contact with any of defendants' patients. Plaintiff alleged it was not anticipated that he ever would have contact with any of defendants' patients. Defendants offered plaintiff a permanent position with Kaiser. A written contract was prepared. Subsequently, however, plaintiff was advised "that to finish the process of becoming an employee he would need [a] mumps vaccine." Plaintiff could not be vaccinated with the mumps vaccine because it is grown in chicken embryos. To be vaccinated, it was alleged, "would violate [plaintiff's] system of beliefs and would be considered immoral by [him]." When plaintiff refused to be vaccinated with the mumps vaccine, defendants withdrew the employment offer.

C. The FEHA and Differing Definitions of Religion

1. The FEHA

The elements of a religious creed discrimination claim are that: the plaintiff had a bona fide religious belief; the employer was aware of that belief; and the belief conflicted

with an employment requirement. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.) With respect to the first element, possession of a bona fide religious belief, section 12940, subdivision (a) states in part: "It shall be an unlawful employment practice . . . [¶] (a) For an employer, because of the . . . religious creed . . . of any person, to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Further, section 12940, subdivision (l), states in part: "It shall be an unlawful employment practice . . . [¶] . . . [¶] (l) For an employer . . . to refuse to hire or employ a person . . . because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer . . . demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance . . . , but is unable to reasonably accommodate the religious belief or observance without undue hardship . . . ."

Definition of the terms "religious belief or observance" and "religious creed" are provided in a statute and in a regulation. Section 12940, subdivision (l) defines religious belief as follows: "Religious belief or observance, as used in [section 12940], includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance." Further description of the scope of the religious belief protection in the FEHA is found in section 12926, subdivision (o), which states: "As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context: [¶] . . . [¶] (o) 'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice." The administrative agency charged with enforcing the FEHA, the Fair Employment and Housing Commission, has also enacted a regulation defining "religious creed."

California Code of Regulations, title 2, section 7293.1 (regulation 7293.1), defines "religious creed" as follows: "'Religious creed' includes any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions." Consistent with regulation 7293.1, plaintiff argues that his commitment to a vegan lifestyle occupies a place in his life parallel to that of traditionally recognized religions. Regulation 7293.1, by its express terms, reflects the notion that religious creed extends beyond traditionally recognized religions to encompass beliefs, observations, or practices occupying a parallel place of importance "to that of traditionally recognized religions" in an individual's life. As will be discussed later, that concept of religion originates from two United States Supreme Court cases involving conscientious objection to military service—*United States v. Seeger* (1965) 380 U.S. 163, 164-188, and *Welsh v. United States* (1970) 398 U.S. 333, 335-344.

It is well settled that the interpretation of a statute by an agency charged with its administration is entitled to great weight. (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679; *Morris v. Williams* (1967) 67 Cal.2d 733, 748.) The administrative interpretation must be consistent with the statute and not in conflict with it. (§ 11342.2; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 82.) Judicial review is limited to whether the agency reasonably interpreted the legislative mandate and whether the regulation is reasonably necessary to effectuate the purpose of the statute. (*Woods v. Superior Court, supra,* 28 Cal.3d at p. 679; *Morris v. Williams, supra,* 67 Cal.2d at pp. 748-749.) Nevertheless, final responsibility for interpretation of the statute rests with the courts. (*Woods v. Superior Court, supra,* 28 Cal.3d at p. 679; *Morris v. Williams, supra,* 67 Cal.2d at p. 748.)

2. California Decisional Authority

We have not found any Department of Fair Employment and Housing decision or any California judicial authority construing "religious creed" within the meaning of the FEHA or regulation 7293.1. But California courts have grappled with the question of what constitutes a religion in other contexts. We discuss several of those decisions.

In *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1166, the California Supreme Court, in a plurality opinion authored by Associate Justice Kathryn Mickle Werdegar, observed that a religious belief is something other than "a philosophy or a way of life." Justice Werdegar further noted, "'[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.' [Citation.]" (*Id.* at pp. 1167-1168, quoting *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 714.) Whether the plaintiff's actions were based on his religious beliefs was not at issue in *Smith.*

In a frequently cited opinion, *Fellowship of Humanity v. Co. Alameda* (1957) 153 Cal.App.2d 673, 677-693, the Court of Appeal, in an opinion authored by then Presiding Justice Raymond Peters, discussed at length the meaning of "religious worship" in a property tax exemption case. The court framed the question before it as follows: "[W]e will assume that the [trial court's] findings, properly interpreted, are to the effect that the adoration of, and reverence to, a deity have no place in the beliefs of [the Fellowship of Humanity]. That presents the fundamental question – is a belief in God or gods essential to 'religious worship,' as those terms are used in the state Constitution?" (*Id.* at p. 680.) The court noted that early federal cases (*Davis v. Beason* (1890) 133 U.S. 333, 342, overruled on other grounds, *Romer v. Evans* (1996) 517 U.S. 620, 634 ; *Berman v. United States* (9th Cir. 1946) 156 F.2d 377, 380; *George v. United States* (9th Cir. 1952) 196 F.2d 445, 451) had defined religion by reference to a belief in a deity or a supreme being. However, Presiding Justice Peters observed: "[T]here are forms of belief generally and commonly accepted as

religions and whose adherents . . . practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 684; accord, *Citizens For Parental Rights v. San Mateo Bd. of Education* (1975) 51 Cal.App.3d 1, 21, fn. 22 ["religious liberty is not limited to theistic beliefs"].) Presiding Justice Peters found that dictionary definitions, decisional authority, and the views of scholars were not particularly helpful in resolving the issue before the court. (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at pp. 684-691.) Presiding Justice Peters noted that in *United States v. Ballard* (1944) 322 U.S. 78, 86, the United States Supreme Court established the concept that ". . . the state has no power to decide the validity of the beliefs held by the group involved." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692.) Presiding Justice Peters then reasoned: "[T]he only [proper] inquiry . . . is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern. [¶] Under this test the belief or nonbelief in a Supreme Being is a false factor. The only way the state can determine the existence or nonexistence of 'religious worship' is to approach the problem objectively. It is not permitted to test validity of, or to compare beliefs. This simply means that 'religion' fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief." (*Id.* at pp. 692-693; see *Saint Germain Foundation v. County of Siskiyou* (1963) 212 Cal.App.2d 911, 916.) Presiding Justice Peters concluded: "[T]he proper interpretation of the terms 'religion' or 'religious' in tax exemption laws should not include any

reference to whether the beliefs involved are theistic or nontheistic. Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 693.)

In *Young Life Campaign v. Patino* (1981) 122 Cal.App.3d 559, 561, the Court of Appeal for the Third Appellate District considered whether an organization was a "church" within the meaning of the Unemployment Insurance Code. The court adopted an approach used by the Internal Revenue Service to determine what is a "church," which the Court of Appeal described as follows: "Rather than defining 'church,' the IRS admits its inability to formulate a definition, and applies criteria derived from the forms and practices observed in recognized churches, without giving controlling weight to any. [Citation.]" (*Id.* at pp. 574-575, fn. omitted.) The criteria for defining a church applied by the Internal Revenue Service were set forth in a footnote and included: "'(1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any other church or denomination, (7) a complete organization of ordained ministers ministering to their congregants, (8) ordained ministers selected after completing prescribed courses of study, (9) a literature of its own, (10) established places of worship, (11) regular congregations, (12) regular religious services, (13) Sunday schools for the religious instruction of the young, (14) schools for the preparation of its ministers.'" (*Id.* at p. 574, fn. 15.) The Court of Appeal observed: "A similar approach to the meaning of 'religion' was recently taken in an illuminating law review note: 'Religion can be described and exemplified in ways that disclose "a

complicated network of similarities overlapping and criss crossing." Unraveled, the various strands do not amount to "religion" for the meaning of the network resides in the interweaving itself. Thus, it is exemplary and not exhaustive to say that religion involves traditional theistic beliefs, or belief in something parallel to an orthodox conception of God, or an ultimate concern, or a set of beliefs that "address themselves to basic questions about the nature of reality and the meaning of human existence." A non-analytic understanding of religion is not boundless, for the network of similarities always includes a binding of the individual to something unrelated to individuality, through the intense operation of faith. No one element or set of elements constitutes a necessary and sufficient condition for religion; presence or absence of an element can neither establish a religion, nor prevent a belief from becoming a religion.' [Fns. omitted.] (Note, *'Mind Control' or Intensity of Faith: The Constitutional Protection of Religious Beliefs* (1978) 13 Harv.Civ.Rights-Civ.Lib.L.Rev. 751, 760-761.)" (*Young Life Campaign v. Patino, supra,* 122 Cal.App.3d at p. 575, fn. 17, fns. omitted.)

These California decisions point away from a strictly theistic definition of religion. A belief in a supreme being is not required. (*Saint Germain Foundation v. County of Siskiyou, supra,* 212 Cal.App.2d at p. 916; *Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692.) But, something more than a philosophy or way of life is required. (*Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at p. 1166.) Moreover, as discussed by then Presiding Justice Peters, the inquiry is "a purely objective one." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692.) Among the factors to be considered are whether the belief system occupies in a person's life a place *parallel* to that of God in recognized religions and whether it addresses ultimate concerns thereby filling a void in the individual's life. (*Id.* at p. 693.) Notably, in considering the concept of religion, California courts have consistently looked to federal authority. In accordance with

that practice, we turn to federal decisions defining religion in varying constitutional, statutory, and regulatory contexts.

3. United States Supreme Court Cases

a. The original theistic view of religion and the development of a broader perspective

Historically, the United States Supreme Court at first adopted a theistic definition of religion. In the nineteenth century, for example, in *Davis v. Beason, supra,* 133 U.S. at page 342, the court stated: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." (See also *United States v. Macintosh* (1931) 283 U.S. 605, 633-634 [dis. opn. of Hughes, C.J.] overruled, *Girouard v. United States* (1946) 328 U.S. 61, 69.) Later, however, the United States Supreme Court took a more expansive view of religion. In *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, for example, the court noted that neither a state nor the federal government can constitutionally "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." In a footnote the court observed, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (*Id.* at p. 495, fn. 11.)

b. *United States v. Seeger*

As noted above, the concept of religion reflected in regulation 7293.1 is derived in part from language in two United States Supreme Court cases construing statutory language—"religious training and belief"—in the context of conscientious objection to military service. The legal dispute before the Supreme Court in *Seeger,* decided in 1965, was as follows, "These cases involve claims of conscientious objectors under [section] 6(j) of the Universal Military Training and

Service Act, 50 U.S.C.App. [section] 456(j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form." (*United States v. Seeger, supra,* 380 U.S. at pp. 164-165.) Section 6(j) of the statute in question defined "religious training and belief" as "'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code.'" (*Id.* at p. 165.) The Seeger court framed the dispositive question before it as follows: "Our question . . . is the narrow one: Does the term 'Supreme Being' as used in [section] 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'? Webster's New International Dictionary (Second Edition.)" (*Id.* at p. 174.) The court emphasized, "In considering this question we resolve it *solely* in relation to the language of [section] 6(j) and not otherwise." (*Ibid.*, italics added.)

The Supreme Court held, "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views." (*United States v. Seeger, supra,* 380 U.S. at p. 165.) The Supreme Court stated: "We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not." (*Id.* at pp. 165-166.) In other words, the court refused to give preference to those who

believe in a conventional God as opposed to those who do not. (*United States v. Seeger, supra,* 380 U.S. at p. 175; *Welsh v. United States, supra,* 398 U.S. at p. 338.)

In *Seeger*, the court concluded Congress intended that to qualify as a conscientious objector, a person needed only to "have a conviction based upon religious training and belief . . . ." (*United States v. Seeger, supra,* 380 U.S. at p. 176.) The court construed that phrase as follows: "Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." (*Ibid.*) The Supreme Court concluded, "This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." (*Ibid.*)

The United States Supreme Court recognized "the difficulties that have always faced the trier of fact in these cases." (*United States v. Seeger, supra,* 380 U.S. at p. 183.) It described the proper test as "essentially objective" and described it as follows, "[N]amely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" (*Id.* at p. 184.) The court further noted that the task before "[l]ocal [Selective Service] boards and courts" is not to reject incomprehensible beliefs, but "to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." (*Id.* at pp. 184-185.)

In *Seeger*, the court held that a potential draftee who could not definitively declare that he believed in a Supreme Being, but who strongly concluded, with the strength of a more traditional religious conviction, that killing in war was wrong, immoral, and unethical, qualified as a conscientious objector. The court stated: "In summary, Seeger professed 'religious belief' and 'religious faith.' He did not disavow any belief 'in a relation to a Supreme Being'; indeed he stated that 'the cosmic order does, perhaps, suggest a creative intelligence.' He decried the tremendous 'spiritual' price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity hold in the lives of his friends, the Quakers." (*United States v. Seeger, supra,* 380 U.S. at p. 187.) The Supreme Court reached a similar conclusion as to the two other potential inductees.

c. *Welsh v. United States*

Section 6(j) of the Universal Military Training and Service Act was again discussed by the United States Supreme Court in 1970, in *Welsh v. United States, supra,* 398 U.S. at pages 338-344. The *Welsh* court elaborated on *Seeger* as follows: "The [*Seeger*] Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of [section] 6(j) was as follows: 'The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.' 380 U.S., at 176 []. [¶] The [*Seeger*] Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts or religion. It held that

[section] 6(j) 'does not distinguish between externally and internally derived beliefs,' id. at 186, [] and also held that 'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect' come within the meaning of 'religious belief' in the Act. Id. at 184-185 []. What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of [section] 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under [section] 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions." (*Welsh v. United States, supra*, 398 U.S. at pp. 339-340.)

In *Welsh*, the United States Supreme Court also discussed the federal statute's exclusion of persons with "'essentially political, sociological, or philosophical views or a merely personal moral code'" from conscientious objector status. (*Welsh v. United States, supra*, 398 U.S. at pp. 342-343.) The court held: "We certainly do not think that [section] 60(j)'s exclusion . . . should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public

policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." (*Ibid.*) The court concluded that section 6(j) "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." (*Id.* at p. 344.)

The United States Supreme Court reversed the judgment convicting the defendant of refusing to submit to induction into the military. (*Welsh v. United States, supra*, 398 U.S. at p. 344.) The defendant in *Welsh*, like the one in *Seeger*, could not definitively affirm or deny a belief in a "Supreme Being." The defendant in *Welsh*, like the potential draftee in *Seeger*, preferred to leave that question open. But, as the United States Supreme Court explained: "[B]oth Seeger and Welsh affirmed on [their] applications [for conscientious objector status] that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a 'still, small voice of conscience'; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, '[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions. [Citation.]" (*Id.* at p. 337.)

d. *Wisconsin v. Yoder*

In 1972, the United States Supreme Court presented a different perspective than it had in the conscientious objector cases discussed above when it decided *Wisconsin v. Yoder* (1972) 406 U.S. 205, 215-216 (plur. opn. of Burger, C.J.). At issue in *Yoder* was whether Amish parents' objections to sending their children to public school beyond eighth grade were premised simply on a way of life or were rooted in religious belief. (*Id.* at p. 215.) In his plurality opinion, Chief Justice Warren Burger explained: "In evaluating [these free exercise of religion claims] we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. *A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.* Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. *Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.* Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause." (*Id.* at pp. 215-216, italics added, fn. omitted.) The plurality then found based on the record: "[T]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to [a] Biblical injunction . . . . As the expert witnesses explained, the Old Order Amish

religion pervades and determines virtually their entire way of life, regulating it with detail of the Talmudic diet through the strictly enforced rules of the church community." (*Id.* at p. 216.) Associate Justice Lewis Powell's concurring opinion concluded religion was the motivating force for the parents' decision not to send their children to public high schools. (*Id.* at pp. 236-237 (conc. opn. of Powell, J.).) As can be noted, the *Yoder* plurality distinguished those beliefs which are entitled to constitutional Free Exercise Clause protection from viewpoints "based on purely secular considerations" or a "subjective evaluation and rejection of the contemporary secular values . . . ." (*Id.* at pp. 215-216.)

4. Federal Employment Discrimination Law

a. statutory and regulatory authority

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ." (42 U.S.C. § 2000e-2(a)(l).) Title VII was amended in 1972 to include a definition of religion. (42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 73.) As amended, the pertinent part of title VII defines religion as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . ." (42 U.S.C. § 2000e(j).) The United States Supreme Court has held, "The intent and effect of this definition was to make it an unlawful employment practice under [title VII] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." (*Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at p. 74; see *Balint v. Carson City* (9th Cir. 1999) 180 F.3d 1047, 1052.)

Federal law governing "religious practices" discrimination in the employment context is drawn from the United States Supreme Court decisions in *Seeger* and *Welsh.*

The applicable Equal Employment Opportunity Commission (EEOC) Guideline states: "'Religious' nature of a practice or belief. [¶] In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the [Equal Employment Opportunity] Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, [*supra*,] 380 U.S. 163 . . . and *Welsh v. United States*, [*supra*,] 398 U.S. 333 . . . . The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. . . ." (29 C.F.R. § 1605.1, fn. omitted.)

An example of the EEOC's administrative construction of the term religion is found in its decision in *LaViolette v. Daley*, appeal No. 01A01748, <http://www.eeoc.gov/decisions/01A01748.txt>. The claimant alleged the Department of Commerce had retaliated against him "because of his unconventional beliefs about cold fusion and other technologies[.]" (*Ibid.*) The claimant argued, "'[D]iscrimination against a person on account of his beliefs is the essence of discrimination on the basis of religion . . . .'" (*Ibid.*) Noting that an agency is required to accept a complaint from an employee who believes he or she had been retaliated against in violation of Title VII, the EEOC held: "'In determining which beliefs are protected under Title VII, the Supreme Court has held that the test is whether the belief professed by a complainant is sincerely held and whether it is, in his own scheme of things, religious.' *Akers v. Department of Transportation*, EEOC Appeal No. 01932415 (May 25, 1993), citing *Welsh v. United States*, [*supra*,] 398 U.S. 333 . . . . Moreover, in defining religious beliefs, our guidelines note

that 'the fact that no religious group espouses such beliefs . . . will not determine whether the belief is a religious belief of the employee . . . .' 29 C.F.R. § 1605.1. [¶] In the instant case, complainant argues that his unconventional beliefs about cold fusion and other technologies should be viewed as a religion and therefore protected. Complainant claims he was terminated and denied the opportunity to be rehired because of religion, which embodies his cold fusion beliefs. Therefore, under applicable law noted above, we find that the agency improperly dismissed complainant's claim of discrimination for failure to state a claim." (*LaViolette v. Daley, supra.*) The EEOC regulation states that the standard adopted therein "was developed in" *Seeger* and *Welsh.* (29 C.F.R. § 1605.1.) We will discuss the EEOC construction of the federal regulatory guidelines and its relationship to *Seeger, Welsh,* and California's regulation 7293.1 later.

b. federal decisional authority

Federal decisional authority generally involves construction of the religious freedom protections in title VII in two contexts. The first involves the application of religious freedom provisions of title VII in cases where a plaintiff is a member of a traditional religious group. The second context involves the application of the title VII religious freedom protections to nontraditional religious organizations.

*i. traditional religious organizations*

In *Equal Employment Opportunity Com. v. Union Independiente* (1st Cir. 2002) 279 F.3d 49, 55-56, the United States Court of Appeals for the First Circuit considered whether a member of the Seventh-Day Adventist Church had a religious belief that prohibited his joining a labor union. The court held: "The requirement that the employee have a 'bona fide religious belief' is an essential element of a religious accommodation claim. Title VII does not mandate an employer or labor organization to accommodate what

amounts to a 'purely personal preference.' *Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997). In order to satisfy this element, the plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held. *See Redmond v. GAF Corp.*, 574 F.2d 897, 901[,] n. 12 (7th Cir. 1978); *cf. also Hager v. Sec. of Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991) (noting similar test for determining whether applicant is entitled to an exemption from military service as a conscientious objector). [¶] As noted above, Title VII's capacious definition of 'religion' includes 'all aspects of religious observance and practice, as well as belief . . . .' 42 U.S.C. § 2000e(j); *see also* 29 C.F.R. § 1605.1 ('[R]eligious practices . . . include moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.') Religious beliefs protected by Title VII need not be 'acceptable, logical, consistent, or comprehensible to others . . . .' *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, [*supra*,] 450 U.S. 707, 714 [] . . . . The statute thus leaves little room for a party to challenge the religious nature of an employee's professed beliefs. Plus, in this case, the religious foundation of the Seventh-Day Adventist faith's opposition to union membership has long been recognized in the opinions of this court and those of our sister circuits. [Citations.] The religious nature of Cruz's professed belief therefore cannot seriously be disputed, nor has [the union] mounted such a challenge." (*Equal Employment Opportunity Com. v. Union Independiente, supra*, 279 F.2d at pp. 55-56; see also *Seshadri v. Kasraian* (7th Cir. 1997) 130 F.3d 798, 800 ["It is true that the EEOC, following [*Seeger*], does not think that the plaintiff in a case of religious discrimination must be a member of an authorized church or subscribe to its full menu of orthodox beliefs. 29 C.F.R. § 1605.1. We agree."]; *Redmond v. GAF Corporation, supra*, 574 F.2d at p. 901, fn. 12 ["is the 'belief' for which protection is sought 'religious' in [the] person's own scheme of things, and . . . is it 'sincerely held'"]; *Cooper v. General Dynamics* (5th Cir. 1976) 533 F.2d 163, 168

["the definition is what may be termed an operative one: all forms and aspects of religion, however eccentric, are protected"].)

*ii. non-traditional religious organizations*

Title VII has also been applied to members of non-traditional religious organizations. An example of the application of title VII to a more non-traditional organization was discussed in *Peterson v. Wilmur Communications, Inc.* (E.D.Wis. 2002) 205 F.Supp.2d 1014, 1018-1019. The United States District Court explained as follows: "[A] test has emerged to determine whether beliefs are a religion for purposes of Title VII. Rather than define religion according to its content, the test requires courts take a functional approach and ask whether a belief "functions as" religion in the life of the individual before the court. *See Redmond v. GAF Corp.*, [*supra,*] 574 F.2d 897, 901 n. 12 . . . (citing *United States v. Seeger*, [*supra,*] 380 U.S. 163 . . . and *Welsh v. United States*, [*supra,*] 398 U.S. 333 . . . and stating that they supply the test for determining what is a 'religion' under Title VII); 29 C.F.R. § 1605.1 (same). Stated another way, the court should find beliefs to be a religion if they 'occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified.' *Seeger*, 380 U.S. at 184 []. To satisfy this test, the plaintiff must show that the belief at issue is '"sincerely held"' and '"religious" in [his or her] own scheme of things.' *Redmond*, 574 F.3d at 901 n. 12 (quoting *Seeger*, 380 U.S. at 185 []). In evaluating whether a belief meets this test, courts must give '"great weight"' to the plaintiff's own characterization of his or her beliefs as religious. *Seeger*, 380 U.S. at 184 []. [¶] . . . Purely 'moral and ethical beliefs' can be religious 'so long as they are held with the strength of religious convictions.' *Welsh*, 398 U.S. at 339-40 []. [¶] . . . So long as the belief is sincerely held and is religious in the plaintiff's scheme of things, the belief is religious regardless of whether it is 'acceptable, logical, consistent, or comprehensible

to others.' *Thomas*, 450 U.S. at 714 []." (*Peterson v. Wilmur Communications, Inc., supra*, 205 F.Supp.2d at pp. 1018-1019.)

In *Peterson*, the United States District Court for the Eastern District of Wisconsin held, on a summary judgment motion, that the World Church of the Creator, a central tenant of which was white supremacy, was a religion within the meaning of title VII. (*Peterson v. Wilmur Communications, Inc., supra*, 205 F.Supp.2d at pp. 1021-1023.) The plaintiff sincerely believed in the teachings of the church. He considered his beliefs religious and considered the church his religion. The teachings of the church played a central role in the plaintiff's life. He had been a minister of the church for more than three years. He worked at putting the church's teachings into every day practice. The federal district court judge concluded: "[A]ll the evidence conclusively reveals that the teachings of [the church] are 'religious' in plaintiff's 'own scheme of things.' These beliefs occupy for plaintiff a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions. Thus, [the church] 'functions as' religion for plaintiff." (*Id.* at pp. 1021-1022.) As can be noted, federal courts in construing the title VII religious freedom provision broadly construe the term religion. As will be noted, we do not believe regulation 7293.1 can be so broadly construed.

5. Other federal religion cases

In contexts other than employment, in the last 23 years, the federal courts have articulated a less expansive definition of religion or religious creed than that in title 29 Code of Federal Regulations section 1605.1 as administratively construed. The key federal cases are discussed below.

a. The Concurring Opinion in *Malnak v. Yogi*

Beginning in 1979, with the filing of the concurring opinion of Third Circuit Court of Appeals Judge Arlin M. Adams, the federal courts began defining religion in a slightly

different fashion than that in *Seeger* and *Welsh*, which were construing section 6(j) of the Universal Military Training and Service Act. Judge Adams's concurring opinion was later adopted by the Third, Eighth, Ninth, and Tenth Circuit Courts of Appeals. The question before the Court of Appeals in *Malnak v. Yogi* (3d Cir. 1979) 592 F.2d 197, 198, as posited in the per curiam decision, was as follows: "This appeal requires us to decide whether the district court erred in determining that the teaching of a course called the Science of Creative Intelligence Transcendental Meditation (SCI/TM) in the New Jersey public high schools . . . constituted an establishment of religion in violation of the first amendment of the United States Constitution." The Court of Appeals, in a per curiam opinion, affirmed the district court's judgment.

Circuit Judge Adams filed a lengthy concurring opinion in which he proposed a modern definition of religion based on three indicia. (*Malnak v. Yogi, supra,* 592 F.2d at pp. 207-210.) Judge Adams stated the question presented as "whether a particular belief-system should be considered a religion for first amendment purposes," and asked, "how far the constitutional definition of religion extends beyond Theistic formulation . . . ." (*Id.* at p. 203.) In an attempt to determine when a belief "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption" (*United States v. Seeger, supra,* 380 U.S. at p. 166), Judge Adams identified three indicia of religion. Judge Adams identified the first prong of the religion test as follows: "The first and most important of these indicia is the nature of the ideas in question. This means that a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion." (*Id.* at p. 208, fn. omitted.) The second test was identified by Judge Adams as follows: "Thus, the 'ultimate' nature of the ideas

presented is the most important and convincing evidence that they should be treated as religious. Certain isolated answers to 'ultimate' questions, however, are not necessarily 'religious' answers, because they lack the element of comprehensiveness, the second of the three indicia. A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive 'truth.'" (*Id.* at pp. 208-209, fn. omitted.) The final criteria was described by Judge Adams was follows: "A third element to consider in ascertaining whether a set of ideas should be classified as a religion is any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life." (*Id.* at p. 209, fns. omitted.)

Although Judge Adams's analysis only appeared in a concurring opinion, his discussion immediately began to find direct as well as indirect acceptance with other federal appellate court decisions. (E.g., *DeHart v. Horn* (3rd Cir. 2000) 227 F.3d 47, 52, fn. 3; *Love v. Reed* (8th Cir. 2000) 216 F.3d 682, 687 [adopting analysis based on Third Circuit ruling premised entirely on Judge Adams's concurring opinion in *Malnak*]; *United States v. Meyers* (10th Cir. 1996) 95 F.3d 1475, 1483 [analyzing religion issue using in part a Third Circuit ruling premised upon Judge Adams's *Malnak* concurring opinion]; *Alvarado v. City of San Jose* (9th Cir. 1994) 94 F.3d 1223, 1227; *Dettmer v. Landon* (4th Cir. 1986) 799 F.2d 929, 931; *Grove v. Mead School Distr. No. 344* (9th Cir. 1985) 753 F.2d 1528, 1534; *Wiggins v. Sargent* (8th Cir. 1985) 753 F.2d 663, 666 [adopting Third Circuit test]; *Africa v. Com. of Pa.* (3rd Cir. 1981) 662 F.2d

1025, 1033-1034; 683, fn. 4.) Similarly, district court judges have relied upon Judge Adams's concurring opinion in whole or in part. (*Mitchell v. Angelone* (E.D.Va. 1999) 82 F.Supp.2d 485, 492; *Altman v. Bedford Cent. School Dist.* (S.D.N.Y. 1999) 45 F.Supp.2d 368, 378, affd. in part, vacated in part, & revd. in part on other grounds (2d Cir. 2001) 245 F.3d 245; *United States v. Meyers* (D.Wyo. 1995) 906 F.Supp. 1494, 1503, affd. (10th Cir. 1996) 95 F.3d 1475; *Church of Scientology Flag Services v. City of Clearwater* (M.D.Fla. 1991) 756 F.Supp. 1498, 1509-1510, affd. in part, vacated in part, & revd. in part on other grounds (11th Cir. 1993) 2 F.3d 1514; *May v. Cooperman* (D.N.J. 1983) 572 F.Supp. 1561, 1568-1569, affd. (3d Cir. 1985) 780 F.2d 240; *Jacques v. Hilton* (D.N.J. 1983) 569 F.Supp. 730, 733, affd. (3d Cir. 1984) 738 F.2d 422; *Church of the Chosen People v. United States* (D.Minn. 1982) 548 F.Supp. 1247, 1252-1253; *Van Schaick v. Church of Scientology* (D.Mass. 1982) 535 F.Supp. 1125, 1144; *Africa v. State of Pennsylvania* (E.D.Penn. 1981) 520 F.Supp. 967, 970, affd. (3d Cir. 1981) 662 F.2d 1025.) Similarly, state courts have utilized directly or indirectly the analysis in *Malnak*. (*Needham Pastoral Counseling Center v. Board of Appeals of Needham* (Mass.App. 1990) 557 N.E.2d 43, 45; *Christofferson v. Church of Scientology* (Or.App. 1982) 644 P.2d 577, 601.) We have found no court which has explicitly or implicitly rejected Judge Adams's views expressed in his 1979 concurring opinion in *Malnak*. Commentators have recognized Judge Adams's opinion as the most influential judicial opinion in the past several decades in terms of defining religion. (See Note, *The Concept of Religion* (1997) 107 Yale L.J. 791, 799; Note, *Constitutional "Religion" A Survey of First Amendment Definitions of Religion* (Summer 2001) Tex. F. on C.L. & C.R. 117, 139-144; Feofanov, *Defining Religion: An Immodest Proposal* (Winter 1994) 23 Hofstra L.R. 309, 375-377.)

b. *Africa v. Com. of Pa.*

In *Africa v. Com. of Pa., supra,* 662 F.2d at pages 1032-1035, the Third Circuit squarely confronted the question of

whether a requirement imposed by a group that only raw foods be ingested by its members was entitled to the protection of a religion under the First Amendment. In *Africa,* a prisoner claimed it would violate the tenets of his religion – the MOVE organization – to eat anything other than raw foods. The plaintiff's claim was premised on the Free Exercise Clause of the First Amendment to the United States Constitution. In *Africa,* unlike *Malnak,* where he wrote only a concurring opinion, the unanimous decision was written by Judge Adams. As will be noted, he relied on his concurring opinion in *Malnak.* The Court of Appeals first observed: "A court's task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. *United States v. Seeger,* [*supra,*] 380 U.S. 163, 185 []; *Callahan v. Woods,* 658 F.2d 679 (9th Cir. Oct. 5, 1981)." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1030.) The court found the plaintiff's beliefs were sincerely held. (*Id.* at p. 1030-1031.) The Third Circuit panel concluded, however, that the MOVE organization did not satisfy "the 'ultimate' ideas" (*id.* at p. 1033), comprehensiveness, or structural characteristics criterion. (*Id.* at p. 1035.) With respect to the ultimate concerns criteria, speaking for his two colleagues, Judge Adams explained: "Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much less places any emphasis upon, what might be classified as a fundamental concern. MOVE does not claim to be theistic: indeed it recognizes no Supreme Being and refers to no transcendental or all-controlling force. Moreover, unlike other recognized religions, with which it is to be compared for first amendment purposes, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence. Africa insists that he has

discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficient analogous to more 'traditional' theologies." (*Id.* at p. 1033.)

The *Africa* court explained further why the plaintiff's beliefs were not religious. The Third Circuit held: "Despite having concluded that MOVE does not deal with 'ultimate ideas,' we concede that the matter is not wholly free from doubt. Appointed counsel for Africa argues that MOVE members so share a fundamental concern, namely, an all-consuming belief in a 'natural' or 'generating' way of life—a way of life that ultimately cannot be reconciled with 'civilization' itself. According to counsel, Africa's insistence on keeping 'in touch with life's vibration' amounts to a form of pantheism, wherein [¶] the entity of God is the world itself, and God is 'swallowed up in that unity which may be designated "nature"' . . . (MOVE's) return to nature is not simply a 'preferred' state. It is the only state. It is the state of being in pure harmony with nature. This, MOVE calls godly. This is pantheism.' [Citation.] [¶] We decline to accept such a characterization of Africa's views, however. We recognize that, under certain circumstances, a pantheistic-based philosophy might qualify for protection under the free exercise clause. From the record in this case, though, we are not persuaded that Africa is an adherent of pantheism, as that word is commonly defined. His mindset seems to be far more the product of a secular philosophy than of a religious orientation. His concerns appear personal (e.g., he contends that a raw food diet is 'healthy' and that pollution and other such products are 'hazardous') and social (e.g., he claims that MOVE is a 'revolutionary' organization, 'absolutely opposed to all that is wrong' and unable to accept existing regimes), rather than spiritual or other-worldly. Indeed, if Africa's statements are deemed sufficient to describe a religion under the Constitution, it might well be necessary to extend first

amendment protection to a host of individuals and organizations who espouse personal and secular ideologies, however much those ideologies appear dissimilar to traditional religious dogmas." (*Africa v. Com. of Pa., supra,* 662 F.2d at pp. 1033-1034, fns. omitted.)

The *Africa* court further noted: "The Supreme Court would appear to have foreclosed such an expansive interpretation of the free exercise clause. In *Wisconsin v. Yoder,* the Court concluded that Wisconsin could not require members of the Amish sect to send their children to school beyond the eighth grade, where there was uncontested evidence that such a course was inconsistent with the Amish religion. The Court arrived at this result only after conducting a searching inquiry into the history and customs of the Amish people and into the nature of their religious teachings and practices. In the course of his opinion for the Court, Chief Justice Burger stressed that the objections of the Amish to compulsory secondary education derived from 'deep religious conviction(s)' rather than from a 'personal' or 'secular' philosophy." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1034.)

The *Africa* court concluded: "[I]t is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however 'ultimate' their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope. As the Supreme Court declared in *Yoder,* '[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.' 406 U.S. at 215 [] (emphasis added)." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1034.)

c. *Wiggins v. Sargent*

The analysis in *Africa* was adopted by the Eighth Circuit Court of Appeals in *Wiggins v. Sargent, supra,* 753 F.2d at page 666. The question before the Court of Appeals in *Wiggins* was whether the Arkansas Department of Correction violated several inmates' First Amendment rights by prohibiting their receipt of religious literature and correspondence with faith based leaders. The district court held the inmates' beliefs were not religious in nature. The Court of Appeals found the district court may have erred in its conclusion to the contrary and remanded the matter for further consideration. (*Id.* at pp. 666-667.) The Court of Appeal held: "The district court was correct in noting that only sincerely held beliefs which are 'rooted in religion' are protected by the free exercise clause. [Citations.] First amendment religious protection is not extended to 'so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.' [Citation.] . . . [¶] From a review of the limited evidence presented at the hearing, we believe that the district court may have erred in its conclusion that the inmates' beliefs are purely secular. Followers of the churches involved here base their beliefs directly on literal interpretations of fundamentalist Christian theology. They believe that the Bible teaches that race mixing is a sin. However 'unpalatable' such ideas are, it is not a court's prerogative to determine the validity of such beliefs. The belief system here has its own orders of worship and Articles of Faith, not to mention the fact that it has outside-the-prison organization and followers. It has its own religious dogma, hierarchy, and mandated lifestyle. It also appears that the inmates' religion may be comprehensive and that it may address fundamental and ultimate questions. *Cf. Africa v. Commonwealth of Pennsylvania,* [*supra,*] 662 F.2d 1025 . . . ." (*Id.* at p. 666, fn. omitted; see also *United States v. DeWitt* (8th Cir. 1996) 95 F.3d 1374, 1375-1376 [the accused's pursuit of out-of-body travel through use of

drugs not rooted in religion where not compelled by any belief or conviction other than his own curiosity and the defendant was not concerned about nature of God].)

d. *Alvarado v. City of San Jose*

The Ninth Circuit has also adopted the approach discussed in the majority opinion in *Africa*. In *Alvarado v. City of San Jose, supra,* 94 F.3d at page 1225, the Ninth Circuit held a municipality's installation and maintenance of a sculpture did not violate the First Amendment Establishment Clause or the California Constitution. The court held the sculpture had no religious significance because: "There is no text, creed or organized group such as the court considered in *Malnak II,* only a sculpture with which plaintiffs have associated a number of unrelated texts and statements of individual response to the work. Under *Africa,* the New Age concepts presented by the plaintiffs, while they invoke 'ultimate concerns,' fail to demonstrate any shared or comprehensive doctrine or to display any of the structural characteristics or formal signs associated with traditional religions. *See* 662 F.2d at 1032-36." (*Alvarado v. City of San Jose, supra,* 94 F.3d at p. 1230.)

e. *United States v. Meyers*

The Tenth Circuit analysis closely follows *Africa* and *Alvarado*. In *United States v. Meyers, supra,* 95 F.3d at page 1479, the Court of Appeals for the Tenth Circuit considered a defendant's claim as follows, "It is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth." In determining whether the defendant's beliefs were religious, the Tenth Circuit panel considered the following factors paralleling traditional religions: whether fundamental questions about "life, purpose and death" were addressed; whether a reality transcending the physical world was addressed; whether a particular manner of acting or way of life

was prescribed; whether the beliefs were founded or significantly influenced by a deity, teacher, seer, or prophet; whether seminal, elemental, fundamental, or sacred writings were embraced; whether there were clergy, ministers, priests, monks, or other keepers of knowledge; the existence of ceremonies and rituals; whether holidays were observed; whether physical appearance was addressed; and whether there was any mission work or proselytizing. (*Id.* at pp. 1483-1484.) The Court of Appeals adopted the district court's analysis: "Marijuana's medical, therapeutic, and social effects are secular, not religious . . . . Here, the Court cannot give Meyers' 'religious' beliefs much weight because those beliefs appear to be derived entirely from his secular beliefs. In other words, Meyers' secular and religious beliefs overlap only in the sense that Meyers holds secular beliefs which he believes so deeply that he has transformed them into a 'religion.' [¶] While Meyers may sincerely believe that his beliefs are religious, this Court cannot rely on his sincerity to conclude that his beliefs rise to the level of a 'religion' and therefore trigger [the Religious Freedom Restoration Act's] protections. Meyers is, of course, absolutely free to think or believe what he wants. If he thinks that his beliefs are a religion then so be it. No one can restrict his beliefs, and no one should begrudge him those beliefs. None of this, however, changes the fact that his beliefs do not constitute a 'religion' as that term is uneasily defined by law. Were the Court to recognize Meyers' beliefs as religious, it might soon find itself on a slippery slope where anyone who was cured of an ailment by a 'medicine' that had pleasant side-effects could claim that they had founded a constitutionally or statutorily protected religion based on the beneficial 'medicine.'" (*Id.* at p. 1484.)

f. *Spies v. Voinovich*

We have found only one case dealing with veganism and religion. In *Spies v. Voinovich* (6th Cir. 1999) 173 F.3d 398, 407, the Court of Appeals considered an inmate's claim that as

a Zen Buddhist he was required to maintain a vegan diet. The Sixth Circuit disagreed, holding that Zen Buddhism did not require a vegan diet and the vegetarian diet provided sufficed. The court, however, observed, "[I]n pointing out that veganism is not required of Zen Buddhists, we are not stating that Spies's veganism is not a sincerely-held religious belief." (*Ibid.*)

6. Is Veganism a Religious Creed For Purposes of the FEHA?

As the United States Supreme Court has observed, "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . ." (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra,* 450 U.S. at p. 714; accord, *Love v. Reed, supra,* 216 F.3d at p. 687.) The test we apply is that set forth in Judge Adams's concurring opinion in *Malnak* which has been adopted by the Third, Eighth, Ninth, and Tenth Circuits. Our review of the authority discussed above leads us to conclude the indicia of religion discussed in Judge Adams's *Malnak* concurring opinion, later adopted by the Third, Ninth, and Tenth Circuit Courts of Appeal in *Africa, Alvarado,* and *Meyers* respectively, presents the best objective method for answering the question whether a belief plays the role of a religion and functions as such in an individual's life. We premise our conclusion on several observations. We summarize them, before fully discussing our analysis. Regulation 7293.1 adopts by its terms a less expansive definition of religion than that promulgated by the EEOC. Other than in the title VII context, the federal courts have in general moved away from the expansive definition of religion in the early conscientious objector cases, *Seeger* and *Welsh,* to a more narrow test—one that compares a belief system to more traditional religions. The indicia of religion discussed in Judge Adam's concurring *Malnak* opinion and adopted by the Third, Eighth, Ninth, and Tenth Circuits presents the best objective test by analogy to mainstream religions for deciding the

question before us. Finally, adopting the Third, Eighth, Ninth, and Tenth Circuit courts' analysis is consistent with regulation 7293.1.

There is a significant difference between the EEOC's administrative construction of the term "religion" and the definition of "religious creed" in regulation 7293.1. Regulation 7293.1 mandates a less expansive construction of "religion." The EEOC definition includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." (29 C.F.R. § 1605.1; see, e.g., *Peterson v. Wilmur Communications, Inc., supra,* 205 F.Supp.2d at p. 1018 ["Purely 'moral and ethical beliefs' can be religious 'so long as they are held with the strength of religious convictions' [Citation.]"]; *Redmond v. GAF Corporation, supra,* 574 F.2d at p. 901, fn. 12 [religion exists where a sincerely held belief "is . . . 'religious' in [the] person's own scheme of things"].) Regulation 7293.1, on the other hand, defines "religious creed" as "beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions.*" (Italics added.) Under regulation 7293.1, purely moral or ethical beliefs that are held with the strength of religious convictions may not qualify for protection under the FEHA. Rather, the express language of regulation 7293.1 requires that the belief, observance, or practice occupy a place in the employee's life of "importance parallel to that of traditionally recognized religions." The "importance parallel to that of traditionally recognized religions" requirement is not contained in title 29 Code of Federal Regulations section 1605.1. For example, in *LaViolette v. Daley, supra,* the EEOC administratively decided that unconventional beliefs about cold fusion and other technologies were entitled to title VII religion protection. But it is unlikely that beliefs concerning cold fusion would be protected under regulation 7293.1 because they do not have an "importance parallel to that of traditionally recognized religions."

The federal regulation, in our view, goes further than did the United States Supreme Court in *Seeger* and *Welsh*. (See, e.g., *Equal Employment Opportunity Com. v. Union Independiente, supra,* 279 F.3d at pp. 55-56.) In *Seeger* and *Welsh*, the high court, while adopting an expansive view of "religion," also spoke of and applied the notion that a given belief, to qualify as religious, must occupy a place in the life of its possessor "parallel to that *filled by the orthodox belief in God* of one who clearly qualifies for the exemption." (*United States v. Seeger, supra,* 380 U.S. at p. 166, italics added.) *Seeger* identified the issue before the court as follows, "Our question, therefore, is the narrow one: Does the term 'Supreme Being' as used in [section] 6(j) mean the orthodox God or *the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent*[.]'" (*Id.* at p. 174, italics added.) The *Seeger* court concluded that the test of a religion is: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel *to that filled by God* of those admittedly qualifying for the exemption . . . ." (*Id.* at p. 176; see also pp. 184-188.) The United States Supreme Court emphasized that religion does not include: "essentially political, sociological, or philosophical views" (*id.* at p. 165); "essentially political, sociological or economic considerations" (*id.* at p. 173); or a merely personal code, i.e., a personal belief "in no way related to a Supreme Being." (*Id.* at p. 186.) *Welsh* is to the same effect. (*Welsh v. United States, supra,* 398 U.S. at p. 340 [a purely ethical or moral belief that occupies in the individual's life *a place parallel to that filled by God in traditional religions*].) The EEOC regulation, as administratively construed, appears to dispense with the requirement that religion is predicated on something more comprehensive than a personal moral or ethical code, however strongly held. It extends, by its terms, to "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Under the EEOC definition, as construed administratively, a strongly held moral or ethical

view may qualify as a religious belief, even though the view is essentially political, sociological, or economic and is in "no way related to a Supreme Being." (*United States v. Seeger, supra,* 380 U.S. at pp. 165, 173, 186.) *Seeger* and *Welsh* are more restrictive than the EEOC's administrative construction of title 29 Code of Federal Regulations section 1605.1.

Regulation 7293.1, on the other hand, requires something more than a strongly held view of right and wrong. In order to secure FEHA protection, the "beliefs, observances, or practices" must occupy in the person's life "*a place of importance parallel to that of traditionally recognized religions.*" (Reg. 7293.1, italics added.) The test is objective. (*United States v. Seeger, supra,* 380 U.S. at p. 184; accord, *Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692.) Regulation 7293.1 adopts, by the italicized language, the notion espoused in *Seeger* and *Welsh* that the belief system in question, to qualify as a religion, parallel the belief systems of traditional religions. (*Welsh v. United States, supra,* 398 U.S at pp. 339-340; *United States v. Seeger, supra,* 380 U.S. at pp. 165-166.)

But identifying the differences between the federal guideline as administratively construed and regulation 7293.1 does not answer the question before us. The question remains as to what belief systems typify traditionally recognized religions. That question must be answered because in order for plaintiff's vegan "beliefs, observances, or practices" to secure FEHA protection, they must have "a place of importance parallel to that of traditionally recognized religions." Complicating the answer to this question is that the expansive definition of religion in the pre-1970 conscientious objector cases, *Seeger* and *Welsh,* has been narrowed somewhat to a more specific test—one that compares a belief system to recognized, traditional religions—as typified by the plurality opinion in *Wisconsin v. Yoder, supra,* 406 U.S. at pages 215-216. To further complicate matters, *Seeger* and *Welsh* were statutory interpretation cases, while *Yoder* is a Free Exercise Clause

decision. (*Wisconsin v. Yoder, supra,* 406 U.S. at pp. 207, 234-236; *Welsh v. United States, supra,* 398 U.S. at pp. 335, 343-344; *United States v. Seeger, supra,* 380 U.S. at p. 174.) Moreover, *Malnak* and its progeny are efforts to define religion in the context of the Free Exercise Clause. (*United States v. Meyers, supra,* 95 F.3d at p. 1484; *Malnak v. Yogi, supra,* 592 F.2d at p. 198.) Finally, many cases which have attempted to define or discuss religious belief have done so in the context of the Religious Freedom Restoration Act, which was invalidated by the United States Supreme Court in *City of Boerne v. Flores* (1997) 521 U.S. 507, 515-530. (*United States v. Meyers, supra,* 95 F.3d at pp. 1479-1484; *Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at pp. 1161-1176.)

We conclude that the best way to assess whether an FEHA claimant's "beliefs, observances, or practices" have "a place of importance parallel to that of traditionally recognized religions," as required by regulation 7293.1, is to utilize the objective analysis enunciated by the Third, Ninth, Eighth, and Tenth Circuits in *Africa, Wiggins, Alvarado, and Meyers.* Flexible application of the objective guidelines identified in those cases will enable courts and administrative agencies to make the sometimes subtle distinction between a religion and a secular belief system. As noted previously, the guidelines are: "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1032, fn. omitted.)

We consider plaintiff's allegations in light of these three indicia. We do not question plaintiff's allegation that his beliefs are sincerely held; it is presumed as a matter of law that they are. However, we disregard conclusory allegations, for example, that plaintiff's beliefs "occupy a place in [his] life parallel to that filled by God in traditionally religious

individuals adhering to the Christian, Jewish or Muslim Faiths." (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 966-967; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) First, plaintiff believes "that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals even for food, clothing and the testing of product safety for humans"; further, it is "a violation of natural law" to transgress this belief. There is no allegation or judicially noticeable evidence plaintiff's belief system addresses fundamental or ultimate questions. There is no claim that veganism speaks to: the meaning of human existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith. There is no apparent spiritual or otherworldly component to plaintiff's beliefs. Rather, plaintiff alleges a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one's life based on that perspective. While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy. (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1033; *Carpenter v. Wilkinson* (N.D. Ohio 1996) 946 F.Supp. 522, 526.) Second, while plaintiff's belief system governs his behavior in wide-ranging respects, including the food he eats, the clothes he wears, and the products he uses, it is not sufficiently comprehensive in nature to fall within the provisions of regulation 7293.1. Plaintiff does not assert that his belief system derives from a power or being or faith to which all else is subordinate or upon which all else depends. (*United States v. Seeger, supra,* 380 U.S. at p. 176; *Africa v. Com. of Pa., supra,* 662 F.2d at p. 1031.) Third, though not determinative, no formal or external signs of a religion are present. There are no: teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays. (*Alvarado v. City of San Jose, supra,* 94 F.3d at p. 1230; *Africa v. Com. of Pa., supra,* 662 F.2d at pp. 1035-1036.)

Absent a broader, more comprehensive scope, extending to ultimate questions, it cannot be said that plaintiff's veganism falls within the scope of regulation 7293.1. Rather, plaintiff's veganism is a personal philosophy, albeit shared by many others, and a way of life. As Associate Justice Werdegar has aptly noted, religious belief is other than "a philosophy or way of life." (*Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at p. 1166.) Therefore, plaintiff's veganism is not a religious creed within the meaning of the FEHA. We quite obviously do not resolve the question of whether a vegan lifestyle that results from a religious belief otherwise meeting the standard in regulation 7293.1 is subject to FEHA coverage.

[The portions of this opinion that follow (parts B7 and C) are deleted from publication.]

7. Leave to Amend

Plaintiff asserts it was an abuse of discretion to refuse to allow him to amend his FEHA causes of action to allege he is an "'Ethical Vegan'" rather than merely a "'Vegan.'" He argues: "To the extent that 'Ethical Vegan' beliefs would qualify as a religious belief, but a 'Vegan' belief would not, leave should have been provided by the Court to the Plaintiff at the initial Demurrer hearing, as well as at the Motion to Amend and for other relief that was held in March 2001." Moreover, plaintiff has not shown it is reasonably possible that alleging he was an ethical vegan would cure the deficiency in his religious creed discrimination and retaliation causes of action. Therefore, we find no abuse of discretion. (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1126; *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 966-967; *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

C. Plaintiff's Tort Claims

1. Workers' Compensation Exclusivity

In his first amended complaint, plaintiff alleged: defendants, with knowledge of plaintiff's veganism, subjected him to a tuberculosis test injection containing animal products or products tested on animals after negligently (sixth cause of action), misadvising him it did not contain such products, resulting in a battery (fourth cause of action) and an invasion of his constitutional right of privacy (fifth cause of action). Plaintiff further alleged defendants by their conduct intentionally (eighth cause of action) or negligently (ninth cause of action) inflicted emotional distress. The trial court sustained defendant's demurrers to plaintiff's battery, privacy invasion, negligence, and intentional emotional distress infliction causes of action on the ground they were barred by workers' compensation exclusivity.[2] (Labor Code, §§ 3600, subd. (a), 3602, subd. (a); *Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810-812.)

Defendants argue the tuberculosis skin test was a precondition to employment. Therefore, defendants reason, any injury sustained arose out of and in the course of employment. (Lab. Code, § 3600; *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-735 [injury resulting from employer directed tuberculosis treatment]; *Roberts v. U. S. O. Camp Shows, Inc.* (1949) 91 Cal.App.2d 884, 885 [injury resulting from employer directed immunization]; see *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 783 [injury occurred during prospective employer required physical

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[2] The trial court also sustained defendants' demurrer—without leave to amend—as to plaintiff's eleventh cause of action, for breach of the implied covenant of good faith and fair dealing. Plaintiff has not raised any issue on appeal with respect to that claim. Any issue that could have been raised has been waived. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 70, disapproved on another point in *Bailey v. County of Los Angeles* (1956) 46 Cal.2d 132, 139.) Plaintiff dismissed with prejudice his tenth cause of action, for breach of an implied-in-fact contract.

agility test].) Defendants assert health screening as a precondition to employment is a normal part of the employment relationship (*ibid.*, see also, *Wickham v. North American Rockwell Corp.* (1970) 8 Cal.App.3d 467, 473); moreover, plaintiff cannot avoid workers' compensation exclusivity by alleging intentional misconduct. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) We agree. We emphasize that plaintiff nowhere alleged that the defendants *intentionally* misadvised him as to the nature of the tuberculosis test with the intent to cause severe emotional distress.

Plaintiff contends his eighth and ninth causes of action for intentional and negligent infliction of emotional distress, respectively, are premised in part on his FEHA claims, and as such are not barred. (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352-353.) Because plaintiff has not sufficiently alleged religious creed discrimination under the FEHA for the reasons previously discussed, his emotional distress claims premised thereon also fail.

Plaintiff argues: "[T]he invasion of privacy cause of action, i.e., the fifth cause of action, is based primarily upon the 'Plaintiff['s] right of privacy under the *United States Constitution*, [and] the *California Constitution*, Article I, Section 1.' [See Complaint, page 15, ¶ 81, lines 23 and 24.] As such an invasion of the Plaintiff['s] right of privacy would be the result of conduct that 'contravenes fundamental public policy.' According to *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754 . . . injury that is the result of conduct that 'contravenes fundamental public policy' is *not* preempted by workers' compensation." Pursuant to well-established authority, this is an insufficient presentation of the issue in terms of analysis and citation to authority. (*Estate of Randall* (1924) 194 Cal. 725, 728-729; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 & fn. 2; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; *San Mateo County Coastal Landowners'*

*Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 558-559; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *People ex rel. Sepulveda v. Highland Fed. Savings & Loan* (1993) 14 Cal.App.4th 1692, 1703, fn. 5; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1090; *Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873-874.) As a result, the contention is waived. Following his rulings on defendants' demurrers, Judge Ronald Sohigian was disqualified from further hearing this case. Judge Cesar C. Sarmiento replaced Judge Sohigian. Plaintiff contends Judge Sarmiento abused his inherent discretion and his authority under Code of Civil Procedure section 170.3, subdivision (4), when he refused to set aside Judge Sohigian's rulings on defendants' demurrers and to grant plaintiff leave to file a second amended complaint. However, plaintiff has not shown good cause to vacate Judge Sohigian's rulings nor has he established that Judge Sarmiento abused his discretion in declining to do so.

2. Statute of Limitations

Even if plaintiff's tort claims were not barred under workers' compensation exclusivity, they are time-barred. Plaintiff's tort claims are subject to the one-year statute of limitations in Code of Civil Procedure section 340, subdivision (3), which encompasses all infringements of personal as opposed to property rights. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 431 & fn. 1 [battery]; *Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 Cal.App.3d 310, 313 [privacy invasion]; *Wiener v. Superior Court* (1976) 58 Cal.App.3d 525, 529 [same]; *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 778-779 [negligence]; *Gopaul v. Herrick Memorial Hosp.* (1974) 38 Cal.App.3d 1002, 1005, disapproved on another point in *Flowers v. Torrance Memorial Hospital Center* (1994) 8 Cal.4th 992, 1002, fn. 6 [same]; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 485 [intentional emotional distress

infliction]; *Bennett v. Suncloud* (1997) 56 Cal.App.4th 91, 97 [negligent infliction of emotional distress]; *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, 1097 [intentional and negligent infliction of emotional distress].) Plaintiff has not addressed the statute of limitations issue. He has not asserted any delayed discovery or accrual of his causes of action. Plaintiff's last day of employment was April 10, 1998. He filed his original complaint more than one year later, on February 3, 2000. Plaintiff's tort claims are time-barred.

D. Plaintiff's Statutory Human Medical Experimentation Claim

In the seventh cause of action of his first amended complaint, plaintiff alleged defendants were negligent per se in failing to obtain his consent to medical experimentation in violation of Health and Safety Code section 24170 et seq. As applicable to the present case, the elements of a cause of action for negligence per se are: (1) defendant's violation of a statute; (2) causing injury; (3) anything of the kind the statute was intended to prevent; and (4) injury to a person the statute was intended to protect. (Evid. Code, § 669; *Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420; *Daum v. Spinecare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1306.) Plaintiff has failed to properly allege the first element because the cited statute, Health and Safety Code section 24170 et seq., is inapplicable. As this court held in *Trantafello v. Medical Center of Tarzana* (1986) 182 Cal.App.3d 315, 320, footnote 2: "[P]laintiff's reliance on Health and Safety Code section 24170 et seq. is completely misplaced. Plaintiffs says [defendant] never obtained the extremely detailed 'informed consent' required by section 24173. These statutes are irrelevant. This act, which is known as the Protection of Human Subjects in Medical Experimentation Act (Health & Saf. Code, § 24170), deals with experiments on human subjects in the course of pure research. It applies 'in the practice or research of medicine in a manner not reasonably related to maintaining or improving the health

of such subject or otherwise directly benefiting such subject.' (Health & Saf. Code, § 24174, subd. (a); see 15 Am.Jur. Proof of Facts 2d, Physician's Failure to Obtain Informed Consent to Innovative Practice or Medical Research, § 3, pp. 726-727; Health & Saf. Code, § 24171.) Here, plaintiff alleges "the requirements that *all* employees of [defendants] be tested for tuberculosis ('TB') and have their blood drawn to be tested for mumps in order to be vaccinated for mumps if they did not have mumps antibodies was part of a Human Medical Experiment being conducted on [defendants'] employees." This conclusory allegation, without more, fails to allege the blood and tuberculosis tests, performed as a prerequisite to employment, were medical experimentation within the meaning of the Protection of Human Subjects in Medical Experimentation Act.

[The remainder of this opinion is to be published.]

III. DISPOSITION

The judgment is affirmed. Defendants, Southern California Permanente Medical Group, Kaiser Foundation Hospitals, and Kaiser Foundation Health Plans, Inc., are to recover their costs on appeal from plaintiff, Jerold Daniel Friedman.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:
GRIGNON, J.
ARMSTRONG, J.

## ORDER MODIFYING OPINION

Filed 9/24/02

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

| | |
|---|---|
| JEROLD DANIEL FRIEDMAN,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al.,<br><br>Defendants and Respondents. | B150017<br><br>(Super. Ct. No. BC224249)<br><br>ORDER MODIFYING OPINION<br><br>[NO CHANGE IN JUDGMENT] |

The opinion filed September 13, 2002, is ordered modified as follows:

page 1 asterisk footnote reads, "Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I, IIA, IIB1-IIB6, and III . . . ." the footnote should read, "Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I, IIA, IIB, IIC1-IIC6, and III . . . ."

On page 36, where it reads, "[The portions of this opinion that follow (parts B7 and C) . . . ." should read, "[The portions of this opinion that follow (parts C7, D and E) . . . ."

On page 37, heading "C" should read as "D"

On page 40, heading "D" should read as "E"

No change in judgment.

TURNER, P.J. GRIGNON, J. ARMSTRONG, J.

OPINION AS PUBLISHED

--- Cal.App.4th ----
2002 WL 31043819 (Cal.App. 2 Dist.), 2 Cal. Daily Op. Serv. 9503, 2002 Daily Journal D.A.R. 10,633

Jerold Daniel FRIEDMAN, Plaintiff and Appellant,
v.
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al., Defendants and Respondents.

**No. B150017.**
**(Super.Ct.No. BC224249).**

Court of Appeal, Second District, Division 5.

Sept. 13, 2002.

Certified for Partial Publication.*

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald M. Sohigian and Cesar C. Sarmiento, Judges. Affirmed.

Myer Law Firm and Scott D. Myer, for Plaintiff and Appellant.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I, IIA, IIB, IIC1-IIC6, and III of this opinion are certified for publication. The remainder of the opinion is not to be published.

Sefarth Shaw, F. Scott Page and Debbie L. Freedman, for Defendants and Respondents.

TURNER, P.J.

I. INTRODUCTION

Jerold Daniel Friedman (plaintiff) appeals from a judgment entered after the general demurrers of Southern California Permanente Medical Group, Kaiser Foundation Hospitals, and Kaiser Foundation Health Plan, Inc. (defendants) were sustained without leave to amend. In the published portion of this opinion, we resolve the question of whether veganism is a "religious creed" within the meaning of the California Fair Employment and Housing Act (FEHA), Government Code[1] section 12940. We conclude veganism is not a "religious creed" within the meaning of the FEHA. Accordingly, we affirm the judgment.

II. DISCUSSION

A. Standard of Review

Our Supreme Court has set forth the standard of review we must apply on appeal from a judgment following an order sustaining a demurrer without leave to amend as follows: "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or

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[1] All further statutory references are to the Government Code except where otherwise noted.

conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, 119 Cal.Rptr.2d 709, 45 P.3d 1171; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.)

B. The Complaint's Allegations of Religious Creed Discrimination

The trial court sustained defendants' demurrers without leave to amend to plaintiff's first through third causes of action of his original complaint for religious creed discrimination and retaliation in violation of the FEHA. The trial court concluded veganism was not a religious creed within the meaning of the FEHA. In his original complaint, plaintiff alleged as follows. He is a strict vegan. Further, he alleged: "As a strict Vegan, [plaintiff] fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [plaintiff] bases his foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, and his beliefs [*sic* ], [plaintiff] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [plaintiff] cannot wear leather, silk or any other material which comes from animals, and cannot use any products such as household

cleansers, soap or toothpaste which have been tested for human safety on animals or derive any of their ingredients from animals. This belief system[ ] guides the way that he lives his life. [Plaintiff's] beliefs are spiritual in nature and set a course for his entire way of life; he would disregard elementary self-interest in preference to transgressing these tenets. [Plaintiff] holds these beliefs with the strength of traditional religious views, and has lived in accordance with his beliefs for over nine (9) years. As an example of the religious conviction that [plaintiff] holds in his Vegan beliefs, [plaintiff] has even been arrested for civil disobedience actions at animal rights demonstrations. This Vegan belief system guides the way that [plaintiff] lives his life. These are sincere and meaningful beliefs which occupy a place in [plaintiff's] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths."

Plaintiff was hired by a temporary agency to work for defendants as a computer contractor. He worked at a pharmaceutical warehouse owned by defendants. He had no contact with any of defendants' patients. Plaintiff alleged it was not anticipated that he ever would have contact with any of defendants' patients. Defendants offered plaintiff a permanent position with Kaiser. A written contract was prepared. Subsequently, however, plaintiff was advised "that to finish the process of becoming an employee he would need [a] mumps vaccine." Plaintiff could not be vaccinated with the mumps vaccine because it is grown in chicken embryos. To be vaccinated, it was alleged, "would violate [plaintiff's] system of beliefs and would be considered immoral by [him]." When plaintiff refused to be vaccinated with the mumps vaccine, defendants withdrew the employment offer.

C. The FEHA and Differing Definitions of Religion

1. The FEHA

The elements of a religious creed discrimination claim are that: the plaintiff had a bona fide religious belief; the employer was aware of that belief; and the belief conflicted with an employment requirement. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370, 58 Cal.Rptr.2d 747.) With respect to the first element, possession of a bona fide religious belief, section 12940, subdivision (a) states in part: "It shall be an unlawful employment practice ... [¶] (a) For an employer, because of the ... religious creed ... of any person, to refuse to hire or employ the person ... or to bar or to discharge the person from employment ... or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Further, section 12940, subdivision (l), states in part: "It shall be an unlawful employment practice ... [¶] ... [¶] (l) For an employer ... to refuse to hire or employ a person ... because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ..., but is unable to reasonably accommodate the religious belief or observance without undue hardship...."

Definition of the terms "religious belief or observance" and "religious creed" are provided in a statute and in a regulation. Section 12940, subdivision (l) defines religious belief as follows: "Religious belief or observance, as used in [section 12940], includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance." Further description of the scope of the religious belief protection in the FEHA is found in section 12926, subdivision (o), which states: "As used in this part in connection with unlawful practices, unless a different meaning

clearly appears from the context: [¶] ... [¶] (o) 'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice." The administrative agency charged with enforcing the FEHA, the Fair Employment and Housing Commission, has also enacted a regulation defining "religious creed ." California Code of Regulations, title 2, section 7293.1 (regulation 7293.1), defines "religious creed" as follows: " 'Religious creed' includes any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions." Consistent with regulation 7293.1, plaintiff argues that his commitment to a vegan lifestyle occupies a place in his life parallel to that of traditionally recognized religions. Regulation 7293.1, by its express terms, reflects the notion that religious creed extends beyond traditionally recognized religions to encompass beliefs, observations, or practices occupying a parallel place of importance "to that of traditionally recognized religions" in an individual's life. As will be discussed later, that concept of religion originates from two United States Supreme Court cases involving conscientious objection to military service--*United States v. Seeger* (1965) 380 U.S. 163, 164-188, 85 S.Ct. 850, 13 L.Ed.2d 733, and *Welsh v. United States* (1970) 398 U.S. 333, 335-344, 90 S.Ct. 1792, 26 L.Ed.2d 308.

It is well settled that the interpretation of a statute by an agency charged with its administration is entitled to great weight. (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679, 170 Cal.Rptr. 484, 620 P.2d 1032; *Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697.) The administrative interpretation must be consistent with the statute and not in conflict with it. (§ 11342.2; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269, 121 Cal.Rptr.2d 203, 47 P.3d 1069; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 82, 78 Cal.Rptr.2d 16,

960 P.2d 1046.) Judicial review is limited to whether the agency reasonably interpreted the legislative mandate and whether the regulation is reasonably necessary to effectuate the purpose of the statute. (*Woods v. Superior Court, supra,* 28 Cal.3d at p. 679, 170 Cal.Rptr. 484, 620 P.2d 1032; *Morris v. Williams, supra,* 67 Cal.2d at pp. 748-749, 63 Cal.Rptr. 689, 433 P.2d 697.) Nevertheless, final responsibility for interpretation of the statute rests with the courts. (*Woods v. Superior Court, supra,* 28 Cal.3d at p. 679, 170 Cal.Rptr. 484, 620 P.2d 1032; *Morris v. Williams, supra,* 67 Cal.2d at p. 748, 63 Cal.Rptr. 689, 433 P.2d 697.)

2. California Decisional Authority

We have not found any Department of Fair Employment and Housing decision or any California judicial authority construing "religious creed" within the meaning of the FEHA or regulation 7293.1. But California courts have grappled with the question of what constitutes a religion in other contexts. We discuss several of those decisions.

In *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1166, 51 Cal.Rptr.2d 700, 913 P.2d 909, the California Supreme Court, in a plurality opinion authored by Associate Justice Kathryn Mickle Werdegar, observed that a religious belief is something other than "a philosophy or a way of life." Justice Werdegar further noted, " '[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.' [Citation.]" (*Id.* at pp. 1167-1168, 51 Cal.Rptr.2d 700, 913 P.2d 909, quoting *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624.) Whether the plaintiff's actions were based on his religious beliefs was not at issue in *Smith.*

In a frequently cited opinion, *Fellowship of Humanity v. Co. Alameda* (1957) 153 Cal.App.2d 673, 677-693, 315 P.2d 394, the Court of Appeal, in an opinion authored by then Presiding Justice Raymond Peters, discussed at length the meaning of "religious worship" in a property tax exemption case. The court framed the question before it as follows: "[W]e will assume that the [trial court's] findings, properly interpreted, are to the effect that the adoration of, and reverence to, a deity have no place in the beliefs of [the Fellowship of Humanity]. That presents the fundamental question--is a belief in God or gods essential to 'religious worship,' as those terms are used in the state Constitution?" (*Id.* at p. 680, 315 P.2d 394.) The court noted that early federal cases (*Davis v. Beason* (1890) 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637, overruled on other grounds, *Romer v. Evans* (1996) 517 U.S. 620, 634, 116 S.Ct. 1620, 134 L.Ed.2d 855; *Berman v. United States* (9th Cir.1946) 156 F.2d 377, 380; *George v. United States* (9th Cir.1952) 196 F.2d 445, 451) had defined religion by reference to a belief in a deity or a supreme being. However, Presiding Justice Peters observed: "[T]here are forms of belief generally and commonly accepted as religions and whose adherents ... practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 684, 315 P.2d 394; accord, *Citizens For Parental Rights v. San Mateo Bd. of Education* (1975) 51 Cal.App.3d 1, 21, fn. 22, 124 Cal.Rptr. 68 ["religious liberty is not limited to theistic beliefs"].) Presiding Justice Peters found that dictionary definitions, decisional authority, and the views of scholars were not particularly helpful in resolving the issue before the court. (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at pp. 684-691, 315 P.2d 394.) Presiding Justice Peters noted that in *United States v. Ballard* (1944) 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148, the United States Supreme Court established the concept that "... the state has no power to decide the validity of the

beliefs held by the group involved." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692, 315 P.2d 394.) Presiding Justice Peters then reasoned: "[T]he only [proper] inquiry ... is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern. [¶] Underthis test the belief or nonbelief in a Supreme Being is a false factor. The only way the state can determine the existence or nonexistence of 'religious worship' is to approach the problem objectively. It is not permitted to test validity of, or to compare beliefs. This simply means that 'religion' fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief." (*Id.* at pp. 692-693, 315 P.2d 394; see *Saint Germain Foundation v. County of Siskiyou* (1963) 212 Cal.App.2d 911, 916, 28 Cal.Rptr. 393.) Presiding Justice Peters concluded: "[T]he proper interpretation of the terms 'religion' or 'religious' in tax exemption laws should not include any reference to whether the beliefs involved are theistic or nontheistic. Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 693, 315 P.2d 394.)

In *Young Life Campaign v. Patino* (1981) 122 Cal.App.3d 559, 561, 176 Cal.Rptr. 23, the Court of Appeal for the Third Appellate District considered whether an organization was a "church" within the meaning of the Unemployment Insurance

Code. The court adopted an approach used by the Internal Revenue Service to determine what is a "church," which the Court of Appeal described as follows: "Rather than defining 'church,' the IRS admits its inability to formulate a definition, and applies criteria derived from the forms and practices observed in recognized churches, without giving controlling weight to any. [Citation.]" (*Id.* at pp. 574-575, 176 Cal.Rptr. 23, fn. omitted.) The criteria for defining a church applied by the Internal Revenue Service were set forth in a footnote and included: " '(1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any other church or denomination, (7) a complete organization of ordained ministers ministering to their congregants, (8) ordained ministers selected after completing prescribed courses of study, (9) a literature of its own, (10) established places of worship, (11) regular congregations, (12) regular religious services, (13) Sunday schools for the religious instruction of the young, (14) schools for the preparation of its ministers.' " (*Id.* at p. 574, fn. 15, 176 Cal.Rptr. 23.) The Court of Appeal observed: "A similar approach to the meaning of 'religion' was recently taken in an illuminating law review note: 'Religion can be described and exemplified in ways that disclose "a complicated network of similarities overlapping and criss crossing." Unraveled, the various strands do not amount to "religion" for the meaning of the network resides in the interweaving itself. Thus, it is exemplary and not exhaustive to say that religion involves traditional theistic beliefs, or belief in something parallel to an orthodox conception of God, or an ultimate concern, or a set of beliefs that "address themselves to basic questions about the nature of reality and the meaning of human existence." A non-analytic understanding of religion is not boundless, for the network of similarities always includes a binding of the individual to something unrelated to individuality, through the intense

operation of faith. No one element or set of elements constitutes a necessary and sufficient condition for religion; presence or absence of an element can neither establish a religion, nor prevent a belief from becoming a religion.' [Fns. omitted.] (Note, *'Mind Control' or Intensity of Faith: The Constitutional Protection of Religious Beliefs* (1978) 13 Harv.Civ.Rights Civ.Lib.L.Rev. 751, 760-761.)" (*Young Life Campaign v. Patino, supra,* 122 Cal.App.3d at p. 575, fn. 17, 176 Cal.Rptr. 23, fns. omitted.)

These California decisions point away from a strictly theistic definition of religion. A belief in a supreme being is not required. (*Saint Germain Foundation v. County of Siskiyou, supra,* 212 Cal.App.2d at p. 916, 28 Cal.Rptr. 393; *Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692, 315 P.2d 394.) But, something more than a philosophy or way of life is required. (*Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at p. 1166, 51 Cal.Rptr.2d 700, 913 P.2d 909.) Moreover, as discussed by then Presiding Justice Peters, the inquiry is "a purely objective one." (*Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692, 315 P.2d 394.) Among the factors to be considered are whether the belief system occupies in a person's life a place *parallel* to that of God in recognized religions and whether it addresses ultimate concerns thereby filling a void in the individual's life. (*Id.* at p. 693, 315 P.2d 394.) Notably, in considering the concept of religion, California courts have consistently looked to federal authority. In accordance with that practice, we turn to federal decisions defining religion in varying constitutional, statutory, and regulatory contexts.

3. United States Supreme Court Cases

a. The original theistic view of religion and the development of a broader perspective

Historically, the United States Supreme Court at first adopted a theistic definition of religion. In the nineteenth century, for example, in *Davis v. Beason, supra,* 133 U.S. at page 342, the court stated: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." (See also *United States v. Macintosh* (1931) 283 U.S. 605, 633-634, 51 S.Ct. 570, 75 L.Ed. 1302 [dis. opn. of Hughes, C.J.] overruled, *Girouard v. United States* (1946) 328 U.S. 61, 69, 66 S.Ct. 826, 90 L.Ed. 1084.) Later, however, the United States Supreme Court took a more expansive view of religion. In *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982, for example, the court noted that neither a state nor the federal government can constitutionally "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." In a footnote the court observed, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (*Id.* at p. 495, fn. 11.)

b. *United States v. Seeger*

As noted above, the concept of religion reflected in regulation 7293.1 is derived in part from language in two United States Supreme Court cases construing statutory language--"religious training and belief"--in the context of conscientious objection to military service. The legal dispute before the Supreme Court in *Seeger,* decided in 1965, was as follows, "These cases involve claims of conscientious objectors under [section] 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. [section] 456(j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form." (*United States v. Seeger, supra,* 380 U.S. at pp.

164-165.) Section 6(j) of the statute in question defined "religious training and belief" as " 'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code.' " (*Id.* at p. 165.) The Seeger court framed the dispositive question before it as follows: "Our question ... is the narrow one: Does the term 'Supreme Being' as used in [section] 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'? Webster's New International Dictionary (Second Edition.)" (*Id.* at p. 174.) The court emphasized, "In considering this question we resolve it *solely* in relation to the language of [section] 6(j) and not otherwise." (*Ibid.*, italics added.)

The Supreme Court held, "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views." (*United States v. Seeger, supra*, 380 U.S. at p. 165.) The Supreme Court stated: "We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in thelives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not." (*Id.* at pp. 165-166.) In other words, the court refused to give preference to those who believe in a conventional God as opposed to those who do not. (*United States v. Seeger, supra*, 380 U.S. at p. 175; *Welsh v. United States, supra*, 398 U.S. at p. 338.)

In *Seeger*, the court concluded Congress intended that to qualify as a conscientious objector, a person needed only to "have a conviction based upon religious training and belief...." (*United States v. Seeger, supra*, 380 U.S. at p. 176.) The court construed that phrase as follows: "Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." (*Ibid.*) The Supreme Court concluded, "This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." (*Ibid.*)

The United States Supreme Court recognized "the difficulties that have always faced the trier of fact in these cases." (*United States v. Seeger, supra*, 380 U.S. at p. 183.) It described the proper test as "essentially objective" and described it as follows, "[N]amely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" (*Id.* at p. 184.) The court further noted that the task before "[l]ocal [Selective Service] boards and courts" is not to reject incomprehensible beliefs, but "to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." (*Id.* at pp. 184-185.)

In *Seeger*, the court held that a potential draftee who could not definitively declare that he believed in a Supreme Being, but who strongly concluded, with the strength of a more

traditional religious conviction, that killing in war was wrong, immoral, and unethical, qualified as a conscientious objector. The court stated: "In summary, Seeger professed 'religious belief' and 'religious faith.' He did not disavow any belief 'in a relation to a Supreme Being'; indeed he stated that 'the cosmic order does, perhaps, suggest a creative intelligence.' He decried the tremendous 'spiritual' price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity hold in the lives of his friends, the Quakers." (*United States v. Seeger, supra,* 380 U.S. at p. 187.) The Supreme Court reached a similar conclusion as to the two other potential inductees.

c. *Welsh v. United States*

Section 6(j) of the Universal Military Training and Service Act was again discussed by the United States Supreme Court in 1970, in *Welsh v. United States, supra,* 398 U.S. at pages 338-344. The *Welsh* court elaborated on *Seeger* as follows: "The [*Seeger* ] Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of [section] 6(j) was as follows: 'The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.' 380 U.S., at 176[ ].[¶] The [*Seeger* ] Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts or religion. It held that [section] 6(j) 'does not distinguish between externally and internally derived beliefs,' id. at 186, [ ] and also held that

'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect' come within the meaning of 'religious belief' in the Act. Id. at 184-185[ ]. What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of [section] 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality--a God--who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by ... God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under [section] 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions." (*Welsh v. United States, supra,* 398 U.S. at pp. 339- 340.)

In *Welsh,* the United States Supreme Court also discussed the federal statute's exclusion of persons with " 'essentially political, sociological, or philosophical views or a merely personal moral code' " from conscientious objector status. (*Welsh v. United States, supra,* 398 U.S. at pp. 342-343.) The court held: "We certainly do not think that [section] 60(j)'s exclusion ... should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within

these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." (*Ibid.*) The court concluded that section 6(j) "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." (*Id.* at p. 344.)

The United States Supreme Court reversed the judgment convicting the defendant of refusing to submit to induction into the military. (*Welsh v. United States, supra,* 398 U.S. at p. 344.) The defendant in *Welsh,* like the one in *Seeger,* could not definitively affirm or deny a belief in a "Supreme Being." The defendant in *Welsh,* like the potential draftee in *Seeger,* preferred to leave that question open. But, as the United States Supreme Court explained: "[B]oth Seeger and Welsh affirmed on [their] applications [for conscientious objector status] that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a 'still, small voice of conscience'; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, '[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions. [Citation.]" (*Id.* at p. 337.)

d. *Wisconsin v. Yoder*

In 1972, the United States Supreme Court presented a different perspective than it had in the conscientious objector cases discussed above when it decided Wisconsin v. Yoder (1972) 406 U.S. 205, 215-216, 92 S.Ct. 1526, 32 L.Ed.2d 15 (plur. opn. of Burger, C.J.). At issue in *Yoder* was whether Amish parents' objections to sending their children to public school beyond eighth grade were premised simply on a way of life or were rooted in religious belief. (*Id.* at p. 215.) In his plurality opinion, Chief Justice Warren Burger explained: "In evaluating [these free exercise of religion claims] we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. *A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.* Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. *Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.* Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause." (*Id.* at pp. 215-216, italics added, fn. omitted.) The plurality then found based on the record: "[T]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to [a] Biblical injunction.... As the expert witnesses

explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with detail of the Talmudic diet through the strictly enforced rules of the church community." (*Id.* at p. 216.) Associate Justice Lewis Powell's concurring opinion concluded religion was the motivating force for the parents' decision not to send their children to public high schools. (*Id.* at pp. 236-237 (conc. opn. of Powell, J.).) As can be noted, the *Yoder* plurality distinguished those beliefs which are entitled to constitutional Free Exercise Clause protection from viewpoints "based on purely secular considerations" or a "subjective evaluation and rejection of the contemporary secular values...." (*Id.* at pp. 215-216.)

4. Federal Employment Discrimination Law

a. statutory and regulatory authority

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion...." (42 U.S.C. § 2000e-2(a)(l).) Title VII was amended in 1972 to include a definition of religion. (42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 73, 97 S.Ct. 2264, 53 L.Ed.2d 113.) As amended, the pertinent part of title VII defines religion as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief...." (42 U.S.C. § 2000e(j).) The United States Supreme Court has held, "The intent and effect of this definition was to make it an unlawful employment practice under [title VII] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." (*Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at p. 74; see *Balint v. Carson City* (9th Cir.1999) 180 F.3d 1047, 1052.)

Federal law governing "religious practices" discrimination in the employment context is drawn from the United States Supreme Court decisions in *Seeger* and *Welsh*. The applicable Equal Employment Opportunity Commission (EEOC) Guideline states: " 'Religious' nature of a practice or belief. [¶] In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the [Equal Employment Opportunity] Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in United States v. Seeger, [supra,] 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 ... and Welsh v. United States, [supra,] 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308.... The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee...." (29 C.F.R. § 1605.1, fn. omitted.)

An example of the EEOC's administrative construction of the term religion is found in its decision in *LaViolette v. Daley*, appeal No. 01A01748, <http://www.eeoc.gov/decisions/01A01748.txt>. The claimant alleged the Department of Commerce had retaliated against him "because of his unconventional beliefs about cold fusion and other technologies[.]" (*Ibid.*) The claimant argued, " '[D]iscrimination against a person on account of his beliefs is the essence of discrimination on the basis of religion....' " (*Ibid.*) Noting that an agency is required to accept a complaint from an employee who believes he or she had been retaliated against in violation of Title VII, the EEOC held: " 'In determining which beliefs are protected under Title VII, the Supreme Court has held that the test is whether the belief professed by a complainant is sincerely held and whether it is,

in his own scheme of things, religious.' *Akers v. Department of Transportation*, EEOC Appeal No. 01932415 (May 25, 1993), citing Welsh v. United States, [supra,] 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308.... Moreover, in defining religious beliefs, our guidelines note that 'the fact that no religious group espouses such beliefs ... will not determine whether the belief is a religious belief of the employee....' 29 C.F.R. § 1605.1.[¶] In the instant case, complainant argues that his unconventional beliefs about cold fusion and other technologies should be viewed as a religion and therefore protected. Complainant claims he was terminated and denied the opportunity to be rehired because of religion, which embodies his cold fusion beliefs. Therefore, under applicable law noted above, we find that the agency improperly dismissed complainant's claim of discrimination for failure to state a claim." (*LaViolette v. Daley, supra.*) The EEOC regulation states that the standard adopted therein "was developed in" *Seeger* and *Welsh.* (29 C.F.R. § 1605.1.) We will discuss the EEOC construction of the federal regulatory guidelines and its relationship to *Seeger, Welsh,* and California's regulation 7293.1 later.

b. federal decisional authority

Federal decisional authority generally involves construction of the religious freedom protections in title VII in two contexts. The first involves the application of religious freedom provisions of title VII in cases where a plaintiff is a member of a traditional religious group. The second context involves the application of the title VII religious freedom protections to nontraditional religious organizations.

*i. traditional religious organizations*

In Equal Employment Opportunity Com. v. Union Independiente (1st Cir.2002) 279 F.3d 49, 55-56, the United States Court of Appeals for the First Circuit considered whether a member of

the Seventh Day Adventist Church had a religious belief that prohibited his joining a labor union. The court held: "The requirement that the employee have a 'bona fide religious belief' is an essential element of a religious accommodation claim. Title VII does not mandate an employer or labor organization to accommodate what amounts to a 'purely personal preference.' Vetter v. Farmland Indus., Inc., 120 F.3d 749, 751 (8th Cir.1997). In order to satisfy this element, the plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held. *See* Redmond v. GAF Corp., 574 F.2d 897, 901[,] n. 12 (7th Cir.1978); *cf. also* Hager v. Sec. of Air Force, 938 F.2d 1449, 1454 (1st Cir.1991) (noting similar test for determining whether applicant is entitled to an exemption from military service as a conscientious objector). [¶] As noted above, Title VII's capacious definition of 'religion' includes 'all aspects of religious observance and practice, as well as belief....' 42 U.S.C. § 2000e(j); *see also* 29 C.F.R. § 1605.1 ('[R]eligious practices ... include moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.') Religious beliefs protected by Title VII need not be 'acceptable, logical, consistent, or comprehensible to others....' Thomas v. Review Bd. of Ind. Employment Sec. Div., [supra,] 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624[ ].... The statute thus leaves little room for a party to challenge the religious nature of an employee's professed beliefs. Plus, in this case, the religious foundation of the Seventh Day Adventist faith's opposition to union membership has long been recognized in the opinions of this court and those of our sister circuits. [Citations.] The religious nature of Cruz's professed belief therefore cannot seriously be disputed, nor has [the union] mounted such a challenge." (*Equal Employment Opportunity Com. v. Union Independiente, supra,* 279 F.2d at pp. 55-56; see also Seshadri v. Kasraian (7th Cir.1997) 130 F.3d 798, 800 ["It is true that the EEOC, following [*Seeger* ], does not think that the plaintiff in a case of religious discrimination must be a member of an authorized church or

subscribe to its full menu of orthodox beliefs. 29 C.F.R. § 1605.1. We agree."]; *Redmond v. GAF Corporation, supra,* 574 F.2d at p. 901, fn. 12 ["is the 'belief' for which protection is sought 'religious' in [the] person's own scheme of things, and ... is it 'sincerely held' "]; *Cooper v. General Dynamics* (5th Cir.1976) 533 F.2d 163, 168 ["the definition is what may be termed an operative one: all forms and aspects of religion, however eccentric, are protected"].)

*ii. non-traditional religious organizations*

Title VII has also been applied to members of non-traditional religious organizations. An example of the application of title VII to a more non- traditional organization was discussed in *Peterson v. Wilmur Communications, Inc.* (E.D.Wis.2002) 205 F.Supp.2d 1014, 1018-1019. The United States District Court explained as follows: "[A] test has emerged to determine whether beliefs are a religion for purposes of Title VII. Rather than define religion according to its content, the test requires courts take a functional approach and ask whether a belief "functions as" religion in the life of the individual before the court. *See Redmond v. GAF Corp., [supra,]* 574 F.2d 897, 901 n. 12 ... (citing *United States v. Seeger, [supra,]* 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 ... and *Welsh v. United States, [supra,]* 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 ... and stating that they supply the test for determining what is a 'religion' under Title VII); 29 C.F.R. § 1605.1 (same). Stated another way, the court should find beliefs to be a religion if they 'occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified.' *Seeger,* 380 U.S. at 184[ ]. To satisfy this test, the plaintiff must show that the belief at issue is ' "sincerely held" ' and ' "religious" in [his or her] own scheme of things.' *Redmond,* 574 F.3d at 901 n. 12 (quoting *Seeger,* 380 U.S. at 185[ ]). In evaluating whether a belief meets this test, courts must give ' "great weight" ' to the plaintiff's own characterization of his or her beliefs as religious. *Seeger,*

380 U.S. at 184[ ].[¶] ... Purely 'moral and ethical beliefs' can be religious 'so long as they are held with the strength of religious convictions.' *Welsh* 398 U.S. at 339-40[ ] .[¶] ... So long as the belief is sincerely held and is religious in the plaintiff's scheme of things, the belief is religious regardless of whether it is 'acceptable, logical, consistent, or comprehensible to others.' *Thomas*, 450 U.S. at 714[ ]." (*Peterson v. Wilmur Communications, Inc., supra*, 205 F.Supp.2d at pp. 1018-1019.)

In *Peterson*, the United States District Court for the Eastern District of Wisconsin held, on a summary judgment motion, that the World Church of the Creator, a central tenant of which was white supremacy, was a religion within the meaning of title VII. (*Peterson v. Wilmur Communications, Inc., supra*, 205 F.Supp.2d at pp. 1021-1023.) The plaintiff sincerely believed in the teachings of the church. He considered his beliefs religious and considered the church his religion. The teachings of the church played a central role in the plaintiff's life. He had been a minister of the church for more than three years. He worked at putting the church's teachings into every day practice. The federal district court judge concluded: "[A]ll the evidence conclusively reveals that the teachings of [the church] are 'religious' in plaintiff's 'own scheme of things.' These beliefs occupy for plaintiff a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions. Thus, [the church] 'functions as' religion for plaintiff." (*Id.* at pp. 1021-1022.) As can be noted, federal courts in construing the title VII religious freedom provision broadly construe the term religion. As will be noted, we do not believe regulation 7293.1 can be so broadly construed.

5. Other federal religion cases

In contexts other than employment, in the last 23 years, the federal courts have articulated a less expansive definition of religion or religious creed than that in title 29 Code of Federal

Regulations section 1605.1 as administratively construed. The key federal cases are discussed below.

a. The Concurring Opinion in *Malnak v. Yogi*

Beginning in 1979, with the filing of the concurring opinion of Third Circuit Court of Appeals Judge Arlin M. Adams, the federal courts began defining religion in a slightly different fashion than that in *Seeger* and *Welsh*, which were construing section 6(j) of the Universal Military Training and Service Act. Judge Adams's concurring opinion was later adopted by the Third, Eighth, Ninth, and Tenth Circuit Courts of Appeals. The question before the Court of Appeals in *Malnak v. Yogi* (3d Cir.1979) 592 F.2d 197, 198, as posited in the per curiam decision, was as follows: "This appeal requires us to decide whether the district court erred in determining that the teaching of a course called the Science of Creative Intelligence Transcendental Meditation (SCI/TM) in the New Jersey public high schools ... constituted an establishment of religion in violation of the first amendment of the United States Constitution." The Court of Appeals, in a per curiam opinion, affirmed the district court's judgment.

Circuit Judge Adams filed a lengthy concurring opinion in which he proposed a modern definition of religion based on three indicia. (*Malnak v. Yogi, supra*, 592 F.2d at pp. 207-210.) Judge Adams stated the question presented as "whether a particular belief-system should be considered a religion for first amendment purposes," and asked, "how far the constitutional definition of religion extends beyond Theistic formulation...." (*Id.* at p. 203.) In an attempt to determine when a belief "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption" (*United States v. Seeger, supra*, 380 U.S. at p. 166), Judge Adams identified three indicia of religion. Judge Adams identified the first prong of the religion

test as follows: "The first and most important of these indicia is the nature of the ideas in question. This means that a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion." (*Id.* at p. 208, fn. omitted.) The second test was identified by Judge Adams as follows: "Thus, the 'ultimate' nature of the ideas presented is the most important and convincing evidence that they should be treated as religious. Certain isolated answers to 'ultimate' questions, however, are not necessarily 'religious' answers, because they lack the element of comprehensiveness, the second of the three indicia. A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive 'truth.' " (*Id.* at pp. 208-209, fn. omitted.) The final criteria was described by Judge Adams was follows: "A third element to consider in ascertaining whether a set of ideas should be classified as a religion is any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life." (*Id.* at p. 209, fns. omitted.)

Although Judge Adams's analysis only appeared in a concurring opinion, his discussion immediately began to find direct as well as indirect acceptance with other federal appellate court decisions. (E.g., *DeHart v. Horn* (3rd Cir.2000) 227 F.3d 47, 52, fn. 3; *Love v. Reed* (8th Cir.2000) 216 F.3d 682,

687 [adopting analysis based on Third Circuit ruling premised entirely on Judge Adams's concurring opinion in *Malnak* ]; *United States v. Meyers* (10th Cir.1996) 95 F.3d 1475, 1483 [analyzing religion issue using in part a Third Circuit ruling premised upon Judge Adams's *Malnak* concurring opinion]; *Alvarado v. City of San Jose* (9th Cir.1994) 94 F.3d 1223, 1227; *Dettmer v. Landon* (4th Cir.1986) 799 F.2d 929, 931; *Grove v. Mead School Distr. No. 344* (9th Cir.1985) 753 F.2d 1528, 1534; *Wiggins v. Sargent* (8th Cir.1985) 753 F.2d 663, 666 [adopting Third Circuit test]; *Africa v. Com. of Pa.* (3rd Cir.1981) 662 F.2d 1025, 1033 1034; 683, fn. 4.) Similarly, district court judges have relied upon Judge Adams's concurring opinion in whole or in part. (*Mitchell v. Angelone* (E.D.Va.1999) 82 F.Supp.2d 485, 492; *Altman v. Bedford Cent. School Dist.* (S.D.N.Y.1999) 45 F.Supp.2d 368, 378, affd. in part, vacated in part, & revd. in part on other grounds (2d Cir.2001) 245 F.3d 245; *United States v. Meyers* (D.Wyo.1995) 906 F.Supp. 1494, 1503, affd. (10th Cir.1996) 95 F.3d 1475; *Church of Scientology Flag Services v. City of Clearwater* (M.D.Fla.1991) 756 F.Supp. 1498, 1509-1510, affd. in part, vacated in part, & revd. in part on other grounds (11th Cir.1993) 2 F.3d 1514; *May v. Cooperman* (D.N.J.1983) 572 F.Supp. 1561, 1568-1569, affd. (3d Cir.1985) 780 F.2d 240; *Jacques v. Hilton* (D.N.J.1983) 569 F.Supp. 730, 733, affd. (3d Cir.1984) 738 F.2d 422; *Church of the Chosen People v. United States* (D.Minn.1982) 548 F.Supp. 1247, 1252-1253; *Van Schaick v. Church of Scientology* (D.Mass.1982) 535 F.Supp. 1125, 1144; *Africa v. State of Pennsylvania* (E.D.Penn.1981) 520 F.Supp. 967, 970, affd. (3d Cir.1981) 662 F.2d 1025.) Similarly, state courts have utilized directly or indirectly the analysis in *Malnak* . (*Needham Pastoral Counseling Center v. Board of Appeals of Needham* (Mass.App.1990) 29 Mass.App.Ct. 31, 557 N.E.2d 43, 45; *Christofferson v. Church of Scientology* (Or.App.1982) 57 Or.App. 203, 644 P.2d 577, 601.) We have found no court which has explicitly or implicitly rejected Judge Adams's views expressed in his 1979 concurring opinion in *Malnak*. Commentators have recognized Judge Adams's opinion as the

most influential judicial opinion in the past several decades in terms of defining religion. (See Note, *The Concept of Religion* (1997) 107 Yale L.J. 791, 799; Note, *Constitutional "Religion" A Survey of First Amendment Definitions of Religion* (Summer 2001) Tex. F. on C.L. & C.R. 117, 139-144; Feofanov, *Defining Religion: An Immodest Proposal* (Winter 1994) 23 Hofstra L.R. 309, 375-377.)

b. *Africa v. Com. of Pa.*

In *Africa v. Com. of Pa., supra,* 662 F.2d at pages 1032-1035, the Third Circuit squarely confronted the question of whether a requirement imposed by a group that only raw foods be ingested by its members was entitled to the protection of a religion under the First Amendment. In *Africa,* a prisoner claimed it would violate the tenets of his religion--the MOVE organization--to eat anything other than raw foods. The plaintiff's claim was premised on the Free Exercise Clause of the First Amendment to the United States Constitution. In *Africa,* unlike *Malnak,* where he wrote only a concurring opinion, the unanimous decision was written by Judge Adams. As will be noted, he relied on his concurring opinion in *Malnak.* The Court of Appeals first observed: "A court's task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. *United States v. Seeger,* [*supra,*] 380 U.S. 163, 185, 85 S.Ct. 850, 13 L.Ed.2d 733 [ ]; *Callahan v. Woods,* 658 F.2d 679 (9th Cir. Oct.5, 1981)." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1030.) The court found the plaintiff's beliefs were sincerely held. (*Id.* at p. 1030-1031.) The Third Circuit panel concluded, however, that the MOVE organization did not satisfy "the 'ultimate' ideas" (*id.* at p. 1033), comprehensiveness, or structural characteristics criterion. (*Id.* at p. 1035.) With respect to the ultimate concerns criteria, speaking for his two colleagues, Judge Adams explained: "Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much

less places any emphasis upon, what might be classified as a fundamental concern. MOVE does not claim to be theistic: indeed it recognizes no Supreme Being and refers to no transcendental or all-controlling force. Moreover, unlike other recognized religions, with which it is to be compared for first amendment purposes, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence. Africa insists that he has discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficient analogous to more 'traditional' theologies." (*Id.* at p. 1033.)

The *Africa* court explained further why the plaintiff's beliefs were not religious. The Third Circuit held: "Despite having concluded that MOVE does not deal with 'ultimate ideas,' we concede that the matter is not wholly free from doubt. Appointed counsel for Africa argues that MOVE members so share a fundamental concern, namely, an all-consuming belief in a 'natural' or 'generating' way of life--a way of life that ultimately cannot be reconciled with 'civilization' itself. According to counsel, Africa's insistence on keeping 'in touch with life's vibration' amounts to a form of pantheism, wherein [¶] the entity of God is the world itself, and God is 'swallowed up in that unity which may be designated "nature" ' ... (MOVE's) return to nature is not simply a 'preferred' state. It is the only state. It is the state of being in pure harmony with nature. This, MOVE calls godly. This is pantheism.' [Citation.] [¶] We decline to accept such a characterization of Africa's views, however. We recognize that, under certain circumstances, a pantheistic-based philosophy might qualify

for protection under the free exercise clause. From the record in this case, though, we are not persuaded that Africa is an adherent of pantheism, as that word is commonly defined. His mindset seems to be far more the product of a secular philosophy than of a religious orientation. His concerns appear personal (e.g., he contends that a raw food diet is 'healthy' and that pollution andother such products are 'hazardous') and social (e.g., he claims that MOVE is a 'revolutionary' organization, 'absolutely opposed to all that is wrong' and unable to accept existing regimes), rather than spiritual or other-worldly. Indeed, if Africa's statements are deemed sufficient to describe a religion under the Constitution, it might well be necessary to extend first amendment protection to a host of individuals and organizations who espouse personal and secular ideologies, however much those ideologies appear dissimilar to traditional religious dogmas." (*Africa v. Com. of Pa., supra,* 662 F.2d at pp. 1033-1034, fns. omitted.)

The *Africa* court further noted: "The Supreme Court would appear to have foreclosed such an expansive interpretation of the free exercise clause. In *Wisconsin v. Yoder,* the Court concluded that Wisconsin could not require members of the Amish sect to send their children to school beyond the eighth grade, where there was uncontested evidence that such a course was inconsistent with the Amish religion. The Court arrived at this result only after conducting a searching inquiry into the history and customs of the Amish people and into the nature of their religious teachings and practices. In the course of his opinion for the Court, Chief Justice Burger stressed that the objections of the Amish to compulsory secondary education derived from 'deep religious conviction(s)' rather than from a 'personal' or 'secular' philosophy ." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1034.)

The *Africa* court concluded: "[I]t is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however 'ultimate' their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all- encompassing their scope. As the Supreme Court declared in *Yoder*, '[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.' 406 U.S. at 215[ ] (emphasis added)." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1034.)

c. *Wiggins v. Sargent*

The analysis in *Africa* was adopted by the Eighth Circuit Court of Appeals in *Wiggins v. Sargent, supra,* 753 F.2d at page 666. The question before the Court of Appeals in *Wiggins* was whether the Arkansas Department of Correction violated several inmates' First Amendment rights by prohibiting their receipt of religious literature and correspondence with faith based leaders. The district court held the inmates' beliefs were not religious in nature. The Court of Appeals found the district court may have erred in its conclusion to the contrary and remanded the matter for further consideration. (*Id.* at pp. 666-667.) The Court of Appeal held: "The district court was correct in noting that only sincerely held beliefs which are 'rooted in religion' are protected by the free exercise clause. [Citations.] First amendment religious protection is not extended to 'so-calledreligions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.' [Citation.] ... [¶] From a review of the limited evidence

presented at the hearing, we believe that the district court may have erred in its conclusion that the inmates' beliefs are purely secular. Followers of the churches involved here base their beliefs directly on literal interpretations of fundamentalist Christian theology. They believe that the Bible teaches that race mixing is a sin. However 'unpalatable' such ideas are, it is not a court's prerogative to determine the validity of such beliefs. The belief system here has its own orders of worship and Articles of Faith, not to mention the fact that it has outside-the-prison organization and followers. It has its own religious dogma, hierarchy, and mandated lifestyle. It also appears that the inmates' religion may be comprehensive and that it may address fundamental and ultimate questions. *Cf.* Africa v. Commonwealth of Pennsylvania, [supra,] 662 F.2d 1025...." (*Id.* at p. 666, fn. omitted; see also United States v. DeWitt (8th Cir.1996) 95 F.3d 1374, 1375-1376 [the accused's pursuit of out-of-body travel through use of drugs not rooted in religion where not compelled by any belief or conviction other than his own curiosity and the defendant was not concerned about nature of God].)

d. *Alvarado v. City of San Jose*

The Ninth Circuit has also adopted the approach discussed in the majority opinion in *Africa*. In Alvarado v. City of San Jose, supra, 94 F.3d at page 1225, the Ninth Circuit held a municipality's installation and maintenance of a sculpture did not violate the First Amendment Establishment Clause or the California Constitution. The court held the sculpture had no religious significance because: "There is no text, creed or organized group such as the court considered in *Malnak II*, only a sculpture with which plaintiffs have associated a number of unrelated texts and statements of individual response to the work. Under *Africa*, the New Age concepts presented by the plaintiffs, while they invoke 'ultimate concerns,' fail to demonstrate any shared or comprehensive

doctrine or to display any of the structural characteristics or formal signs associated with traditional religions. *See* 662 F.2d at 1032-36." (*Alvarado v. City of San Jose, supra,* 94 F.3d at p. 1230.)

e. *United States v. Meyers*

The Tenth Circuit analysis closely follows *Africa* and *Alvarado.* In *United States v. Meyers, supra,* 95 F.3d at page 1479, the Court of Appeals for the Tenth Circuit considered a defendant's claim as follows, "It is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth." In determining whether the defendant's beliefs were religious, the Tenth Circuit panel considered the following factors paralleling traditional religions: whether fundamental questions about "life, purpose and death" were addressed; whether a reality transcending the physical world was addressed; whether a particular manner of acting or way of life was prescribed; whether the beliefs were founded or significantly influenced by a deity, teacher, seer, or prophet; whether seminal, elemental, fundamental, or sacred writings were embraced; whether there were clergy, ministers, priests, monks, or other keepers of knowledge; the existence of ceremonies and rituals; whether holidays were observed; whether physical appearance was addressed; and whether there was any mission work or proselytizing. (*Id.* at pp. 1483-1484.) The Court of Appeals adopted the district court's analysis: "Marijuana's medical, therapeutic, and social effects are secular, not religious.... Here, the Court cannot give Meyers' 'religious' beliefs much weight because those beliefs appear to be derived entirely from his secular beliefs. In other words, Meyers' secular and religious beliefs overlap only in the sense that Meyers holds secular beliefs which he believes so deeply that he has transformed them into a 'religion.' [¶] While Meyers may sincerely believe that his beliefs are

religious, this Court cannot rely on his sincerity to conclude that his beliefs rise to the level of a 'religion' and therefore trigger [the Religious Freedom Restoration Act's] protections. Meyers is, of course, absolutely free to think or believe what he wants. If he thinks that his beliefs are a religion then so be it. No one can restrict his beliefs, and no one should begrudge him those beliefs. None of this, however, changes the fact that his beliefs do not constitute a 'religion' as that term is uneasily defined by law. Were the Court to recognize Meyers' beliefs as religious, it might soon find itself on a slippery slope where anyone who was cured of an ailment by a 'medicine' that had pleasant side- effects could claim that they had founded a constitutionally or statutorily protected religion based on the beneficial 'medicine.' " (*Id.* at p. 1484.)

f. *Spies v. Voinovich*

We have found only one case dealing with veganism and religion. In *Spies v. Voinovich* (6th Cir.1999) 173 F.3d 398, 407, the Court of Appeals considered an inmate's claim that as a Zen Buddhist he was required to maintain a vegan diet. The Sixth Circuit disagreed, holding that Zen Buddhism did not require a vegan diet and the vegetarian diet provided sufficed. The court, however, observed, "[I]n pointing out that veganism is not required of Zen Buddhists, we are not stating that Spies's veganism is not a sincerely-held religious belief." (*Ibid.*)

6. Is Veganism a Religious Creed For Purposes of the FEHA?

As the United States Supreme Court has observed, "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task...." (*Thomas v. Review Bd., Ind. Empl. Sec. Div., supra,* 450 U.S. at p. 714; accord, *Love v. Reed, supra,* 216 F.3d at p. 687.) The test we apply is that set forth in Judge Adams's concurring opinion in *Malnak* which has been adopted by the Third, Eighth, Ninth, and Tenth

Circuits. Our review of the authority discussed above leads us to conclude the indicia of religion discussed in Judge Adams's *Malnak* concurring opinion, later adopted by the Third, Ninth, and Tenth Circuit Courts of Appeal in *Africa, Alvarado,* and *Meyers* respectively, presents the best objective method for answering the question whether a belief plays the role of a religion and functions as such in an individual's life. We premise our conclusion on several observations. We summarize them, before fully discussing our analysis. Regulation 7293.1 adopts by its terms a less expansive definition of religion than that promulgated by the EEOC. Other than in the title VII context, the federal courts have in general moved away from the expansive definition of religion in the early conscientious objector cases, *Seeger* and *Welsh,* to a more narrow test--one that compares a belief system to more traditional religions. The indicia of religion discussed in Judge Adam's concurring *Malnak* opinion and adopted by the Third, Eighth, Ninth, and Tenth Circuits presents the best objective test by analogy to mainstream religions for deciding the question before us. Finally, adopting the Third, Eighth, Ninth, and Tenth Circuit courts' analysis is consistent with regulation 7293.1.

There is a significant difference between the EEOC's administrative construction of the term "religion" and the definition of "religious creed" in regulation 7293.1. Regulation 7293.1 mandates a less expansive construction of "religion." The EEOC definition includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." (29 C.F.R. § 1605.1; see, e.g., *Peterson v. Wilmur Communications, Inc., supra,* 205 F.Supp.2d at p. 1018 ["Purely 'moral and ethical beliefs' can be religious 'so long as they are held with the strength of religious convictions' [Citation.]"]; *Redmond v. GAF Corporation, supra,* 574 F.2d at p. 901, fn. 12 [religion exists where a sincerely held belief "is ... 'religious' in [the] person's own scheme of things"].)

Regulation 7293.1, on the other hand, defines "religious creed" as "beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions.*" (Italics added.) Under regulation 7293.1, purely moral or ethical beliefs that are held with the strength of religious convictions may not qualify for protection under the FEHA. Rather, the express language of regulation 7293.1 requires that the belief, observance, or practice occupy a place in the employee's life of "importance parallel to that of traditionally recognized religions." The "importance parallel to that of traditionally recognized religions" requirement is not contained in title 29 Code of Federal Regulations section 1605.1. For example, in *LaViolette v. Daley, supra,* the EEOC administratively decided that unconventional beliefs about cold fusion and other technologies were entitled to title VII religion protection. But it is unlikely that beliefs concerning cold fusion would be protected under regulation 7293.1 because they do not have an "importance parallel to that of traditionally recognized religions."

The federal regulation, in our view, goes further than did the United States Supreme Court in *Seeger* and *Welsh.* (See, e.g., *Equal Employment Opportunity Com. v. Union Independiente, supra,* 279 F.3d at pp. 55-56.) In *Seeger* and *Welsh,* the high court, while adopting an expansive view of "religion," also spoke of and applied the notion that a given belief, to qualify as religious, must occupy a place in the life of its possessor "parallel to that *filled by the orthodox belief in God* of one who clearly qualifies for the exemption." (*United States v. Seeger, supra,* 380 U.S. at p. 166, italics added.) *Seeger* identified the issue before the court as follows, "Our question, therefore, is the narrow one: Does the term 'Supreme Being' as used in [section] 6(j) mean the orthodox God or *the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent* [.]' " (*Id.* at p. 174, italics

added.) The *Seeger* court concluded that the test of a religion is: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel *to that filled by God* of those admittedly qualifying for the exemption...." (*Id.* at p. 176; see also pp. 184-188.) The United States Supreme Court emphasized that religion does not include: "essentially political, sociological, or philosophical views" (*id.* at p. 165); "essentially political, sociological or economic considerations" (*id.* at p. 173); or a merely personal code, i.e., a personal belief "in no way related to a Supreme Being." (*Id.* at p. 186.) *Welsh* is to the same effect. (*Welsh v. United States, supra,* 398 U.S. at p. 340 [a purely ethical or moral belief that occupies in the individual's life *a place parallel to that filled by God in traditional religions* ].) The EEOC regulation, as administratively construed, appears to dispense with the requirement that religion is predicated on something more comprehensive than a personal moral or ethical code, however strongly held. It extends, by its terms, to "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Under the EEOC definition, as construed administratively, a strongly held moral or ethical view may qualify as a religious belief, even though the view is essentially political, sociological, or economic and is in "no way related to a Supreme Being." (*United States v. Seeger, supra,* 380 U.S. at pp. 165, 173, 186.) *Seeger* and *Welsh* are more restrictive than the EEOC's administrative construction of title 29 Code of Federal Regulations section 1605.1.

Regulation 7293.1, on the other hand, requires something more than a strongly held view of right and wrong. In order to secure FEHA protection, the "beliefs, observances, or practices" must occupy in the person's life "*a place of importance parallel to that of traditionally recognized religions.*" (Reg. 7293.1, italics added.) The test is objective. (*United States v. Seeger, supra,* 380 U.S. at p. 184; accord, *Fellowship of Humanity v. Co. Alameda, supra,* 153 Cal.App.2d at p. 692, 315 P.2d 394.) Regulation

7293.1 adopts, by the italicized language, the notion espoused in *Seeger* and *Welsh* that the belief system in question, to qualify as a religion, parallel the belief systems of traditional religions. (*Welsh v. United States, supra,* 398 U.S at pp. 339-340; *United States v. Seeger, supra,* 380 U.S. at pp. 165-166 .)

But identifying the differences between the federal guideline as administratively construed and regulation 7293.1 does not answer the question before us. The question remains as to what belief systems typify traditionally recognized religions. That question must be answered because in order for plaintiff's vegan "beliefs, observances, or practices" to secure FEHA protection, they must have "a place of importance parallel to that of traditionally recognized religions." Complicating the answer to this question is that the expansive definition of religion in the pre 1970 conscientious objector cases, *Seeger* and *Welsh,* has been narrowed somewhat to a more specific test--one that compares a belief system to recognized, traditional religions--as typified by the plurality opinion in *Wisconsin v. Yoder, supra,* 406 U.S. at pages 215-216. To further complicate matters, *Seeger* and *Welsh* were statutory interpretation cases, while *Yoder* is a Free Exercise Clause decision. (*Wisconsin v. Yoder, supra,* 406 U .S. at pp. 207, 234-236; *Welsh v. United States, supra,* 398 U.S. at pp. 335, 343-344; *United States v. Seeger, supra,* 380 U.S. at p. 174.) Moreover, *Malnak* and its progeny are efforts to define religion in the context of the Free Exercise Clause. (*United States v. Meyers, supra,* 95 F.3d at p. 1484; *Malnak v. Yogi, supra,* 592 F.2d at p. 198.) Finally, many cases which have attempted to define or discuss religious belief have done so in the context of the Religious Freedom Restoration Act, which was invalidated by the United States Supreme Court in *City of Boerne v.. Flores* (1997) 521 U.S. 507, 515-530, 117 S.Ct. 2157, 138 L.Ed.2d 624. (*United States v. Meyers, supra,* 95 F.3d at pp. 1479- 1484; *Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at pp. 1161-1176, 51 Cal.Rptr.2d 700, 913 P.2d 909.)

We conclude that the best way to assess whether an FEHA claimant's "beliefs, observances, or practices" have "a place of importance parallel to that of traditionally recognized religions," as required by regulation 7293.1, is to utilize the objective analysis enunciated by the Third, Ninth, Eighth, and Tenth Circuits in *Africa, Wiggins, Alvarado, and Meyers.* Flexible application of the objective guidelines identified in those cases will enable courts and administrative agencies to make the sometimes subtle distinction between a religion and a secular belief system. As noted previously, the guidelines are: "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs." (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1032, fn. omitted.)

We consider plaintiff's allegations in light of these three indicia. We do not question plaintiff's allegation that his beliefs are sincerely held; it is presumed as a matter of law that they are. However, we disregard conclusory allegations, for example, that plaintiff's beliefs "occupy a place in [his] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths." (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, 271 Cal.Rptr. 146, 793 P.2d 479.) First, plaintiff believes "that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals even for food, clothing and the testing of product safety for humans"; further, it is "a violation of natural law" to transgress this belief. There is no allegation or judicially noticeable evidence plaintiff's belief system addresses fundamental or ultimate questions. There is no claim that veganism speaks to: the meaning of human

existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith. There is no apparent spiritual or otherworldly component to plaintiff's beliefs. Rather, plaintiff alleges a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one's life based on that perspective. While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy. (*Africa v. Com. of Pa., supra,* 662 F.2d at p. 1033; *Carpenter v. Wilkinson* (N.D.Ohio 1996) 946 F.Supp. 522, 526.) Second, while plaintiff's belief system governs his behavior in wide-ranging respects, including the food he eats, the clothes he wears, and the products he uses, it is not sufficiently comprehensive in nature to fall within the provisions of regulation 7293.1. Plaintiff does not assert that his belief system derives from a power or being or faith to which all else is subordinate or upon which all else depends. (*United States v. Seeger, supra,* 380 U.S. at p. 176; *Africa v. Com. of Pa., supra,* 662 F.2d at p. 1031.) Third, though not determinative, no formal or external signs of a religion are present. There are no: teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays. (*Alvarado v. City of San Jose, supra,* 94 F.3d at p. 1230; *Africa v. Com. of Pa., supra,* 662 F.2d at pp. 1035-1036.)

Absent a broader, more comprehensive scope, extending to ultimate questions, it cannot be said that plaintiff's veganism falls within the scope of regulation 7293.1. Rather, plaintiff's veganism is a personal philosophy, albeit shared by many others, and a way of life. As Associate Justice Werdegar has aptly noted, religious belief is other than "a philosophy or way of life." (*Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at p. 1166, 51 Cal.Rptr.2d 700, 913 P.2d 909.) Therefore, plaintiff's veganism is not a religious creed within the meaning of the FEHA. We quite obviously do not resolve the question

of whether a vegan lifestyle that results from a religious belief otherwise meeting the standard in regulation 7293.1 is subject to FEHA coverage.

7. Leave to Amend**

III. DISPOSITION

The judgment is affirmed. Defendants, Southern California Permanente Medical Group, Kaiser Foundation Hospitals, and Kaiser Foundation Health Plans, Inc., are to recover their costs on appeal from plaintiff, Jerold Daniel Friedman.

We concur: GRIGNON and ARMSTRONG, JJ.

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** See footnote *, *ante*.

**ORDER DENYING PETITION FOR RECONSIDERATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

DATE: October 7, 2002

Scott D. Myer
Law Offices Of
11040 Santa Monica Blvd.
Suite 320
Los Angeles, CA 90025-7515

Jerold Daniel Friedman
vs.
Southern California Permanente Group, et al.

B150017
Los Angeles County No. BC224249

THE COURT:

Appellant's petition for rehearing is denied.

## ORDER DENYING PETITION FOR REVIEW TO CALIFORNIA SUPREME COURT

Court of Appeal, Second Appellate District, Division Five - No. B 150017
**S110916**

**IN THE SUPREME COURT OF CALIFORNIA**
**En Banc**

**SUPREME COURT**
**FILED**
**NOV 26 2002**
**Frederick K. Ohlrich Clerk**
**DEPUTY**

JEROLD DANIEL FRIEDMAN, Plaintiff and Appellant,
v.
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al.,
Defendants and Respondents.

Petition for review DENIED.
Werdegar, J., and Chin, J., were recused and did not participate.

/s/ GEORGE

Chief Justice

## RELEVANT PROVISIONS INVOLVED

**First Amendment to the Constitution of the United States of America:**

**Amendment I.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Tenth Amendment to the Constitution of the United States of America:**

**Amendment X.** The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**Fourteenth Amendment to the Constitution of the United States of America:**

**Amendment XIV. Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section. 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section. 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

**Section. 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section. 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**California Government Code §12926**

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday.

(c) "Employee" does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows: "Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position. (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: (A) The function may be essential because the reason the position exists is to perform that function. (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed. (C) The

function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. (2) Evidence of whether a particular function is essential includes, but is not limited to, the following: (A) The employer's judgment as to which functions are essential. (B) Written job descriptions prepared before advertising or interviewing applicants for the job. (C) The amount of time spent on the job performing the function. (D) The consequences of not requiring the incumbent to perform the function. (E) The terms of a collective bargaining agreement. (F) The work experiences of past incumbents in the job. (G) The current work experience of incumbents in similar jobs.

(g) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(h) "Medical condition" means either of the following: (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. (2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following: (A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder. (B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(i) "Mental disability" includes, but is not limited to, all of the following: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section: (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. (B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult. (C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working. (2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services. (3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part. (4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult. (5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2). "Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(j) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

(k) "Physical disability" includes, but is not limited to, all of the following: (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. (B) Limits a major life activity. For purposes of this section: (i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult. (iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working. (2) Any other health impairment not described in paragraph (1) that requires special education or related services. (3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part. (4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult. (5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2). (6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(l) Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

(m) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(n) "Reasonable accommodation" may include either of the following: (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(o) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice.

(p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

(q) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(r) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust

their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(s) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors: (1) the nature and cost of the accommodation needed, (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities, (4) the type of operations, including the composition, structure, and functions of the workforce of the entity, and (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

**California Government Code §12940**

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment. (1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations. (2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner

that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. (3) Nothing in this part relating to discrimination on account of marital status shall do either of the following: (A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission. (B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents. (4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans. (5) Nothing in this part prohibits an employer from refusing to employ an individual because of his or her age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate

in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or any intent to make any such limitation, specification or discrimination. Nothing in this part prohibits an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, where the law compels or provides for that action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition. (2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation. (3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a

medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition. (2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job-related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. (2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. (3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action. (4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision. (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer"

does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2. (C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. (5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria: (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance. (B) The person is customarily engaged in an independently established business. (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable

to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

**U.S. Code (01/05/99) 42 U.S.C. Section 2000e. Definitions**
For the purposes of this subchapter

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association,or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay,

hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 et seq.);

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce

within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.), and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.).

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer

demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this
title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter. (m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

**U.S. Code (01/05/99) 42 U.S.C. Section 2000e-2. Unlawful employment practices**

(a) Employer practices It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend

to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for

employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school,

college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management

committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 (50 U.S.C. 781 et seq.).

(g) National security Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if -

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and

authorized by minimum wage provisions Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance

which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the

respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act (21 U.S.C. 801 et seq.) or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders (1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws -

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had - (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and (II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual

situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to -

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of

members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or (D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before

the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

**29 Code of Federal Regulations §1605.1**

§1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not an issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970). The Commission has consistently applied this in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines include both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

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[1] See CD 76-104 (1976), CCH 6500; CD 71-2620 (1971), CCH 6283; CD 71-779 (1970), CCH [Para.] 6180.

**2 California Code of Regulations §7293.0**

§7293.0 General Prohibition Against Religious Creed Discrimination

(a) Statutory Source. These regulations concerning religious discrimination are adopted by the Commission pursuant to Section 1420 of the Labor Code. (Section 1294 of the Government Code.)

(b) Statement of Purpose. The freedom to worship as one believes is a basic human right. To that end, the accommodation to religious pluralism is an important and necessary part of our society. Questions of religious discrimination and accommodation to the varied religious practices of the people of the State of California often arise in complex and emotionally charged situations; therefore, each case must be reviewed on an individual basis to best balance often contradictory social needs.

(c) Incorporation of General Regulations. These regulations incorporate all of the provisions of Subchapter 1 and 2 of Chapter 2, unless specifically excluded or modified

**2 California Code of Regulations §7293.1**

Title 2, §7293.1 Establishing Religious Creed Discrimination

"Religious creed" includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing:

(a) Employment benefits have been denied, in whole or in part, because of an applicant's or employer's religious creed or lack of religious creed.

(b) The employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation.

**2 California Code of Regulations §7293.3**

§7293.3. Reasonable Accommodation

An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship.

(a) Reasonable accommodation may include, but is not limited to, job restructuring, job assignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances.

(b) In determining whether a reasonable accommodation would impose an undue hardship on the operations of an employer or other covered entity, factors to be considered include, but are not limited to:

(1) The size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters;

(2) The overall size of the employer or other covered entity with respect to the number of employees, number and type of facilities, and size of budget.

(3) The type of the establishment's or facility's operation, including the composition and structure of the workforce or membership;

(4) The type of employer's or other covered entity's operation, including the composition and structure of the workforce or membership.

(5) The nature and cost of the accommodation involved.

(6) Reasonable notice to the employer or other covered entity of the need for accommodation; and

(7) Any available reasonable alternative means of accommodation.

(c) Reasonable accommodation includes, but is not limited to, the following specific employment policies or practices:

(1) Interview and examination times. Scheduled times for interviews, examinations, and other functions related to employment opportunities shall reasonably accommodate religious practices.

(2) Dress Standards. Dress standards or requirements for personal appearance shall be flexible enough to take into account religious practices.

(3) Union Dues. An employer or union shall not require membership from any employee or applicant whose religious creed prohibits such membership. An applicant's or employee's religious creed shall be reasonably accommodated with respect to union dues.

**Internal Revenue Manual**
**Hndbk. 7.8.1 Chap. 3 Religious, Charitable, Scientific, Educational, and Other Organizations Under IRC 501(c)(3)**
**[7.8.1] 3.3.2 (05-25-1999)**
**Specific Guidelines**

1. Review IRM for instructions and procedures for Specific organizations that may be a "mail order ministry" or a Guidelines possible means of tax abuse.

2. In determining if an organization of the above type is organized and operated for exclusively religious purposes under IRC 501(c)(3), ask two basic questions:

A. Are the organization's beliefs truly and sincerely held by those professing them, as opposed to a mere sham? and

B. Are the practices and rites associated with the organization's belief or creed illegal or contrary to clearly defined public policy?

If beliefs are truly and sincerely held, and practices do not violate law or clearly defined public policy, the Service will not question the religious nature of the organization's beliefs.

3. The fact that an organization is organized for religious purposes does not preclude the Service from determining if its activities further religious or other exempt purposes. Likewise, a religious organization must otherwise meet the requirements under IRC 501(c)(3) to be exempt. Consider the issues of inurement, private benefit, substantial legislative and prohibited political activities, and operation for primarily business purposes. Chapter 3 of IRM 7.8.2, Exempt Organizations Technical Guidelines Handbook, discusses the requirements for exemption under IRC 501(c)(3).

4. In determining if a religious organization is a church within the meaning of IRC 170(b)(1)(a)(i), 508(c)(1)(A), or 6033(a)(2)(A), consider if the organization has the following characteristics:

A. A distinct legal existence;

B. A recognized creed and form of worship;

C. A definite and distinct ecclesiastical government;

D. A formal code of doctrine and discipline;

E. A distinct religious history;

F. A membership not associated with any other church or denomination;

G. A complete organization of ordained ministers ministering to their congregations;

H. Ordained ministers selected after completing prescribed courses of study;

I. A literature of its own;

J. Established place of worship;

K. Regular congregations;

L. Regular religious services;

M. Sunday schools for the religious instruction of the young;

N. Schools for the preparation of its ministers; and

O. Any other facts and circumstances that may bear upon the organization's claim for church status.

5. The characteristics are merely tools for making a factual determination of church status. They are not exclusive and should not be mechanically applied. Few churches will have all the characteristics. Also, some characteristics may be given more weight than others in a given case.

6. Determine if the organization engages in unrelated trade or business subject to tax. Chapters 35 through 40 of IRM 7.8.2, Exempt Organizations Technical Guidelines Handbook, discuss the rules applicable to unrelated business income.

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**OPPOSITION TO DEMURRER**
**IN STATE COURT**

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**MYER LAW FIRM**
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**ORIGINAL FILED**
**JUN 28 2000**
**LOS ANGELES**
**SUPERIOR COURT**

Attorney for Plaintiff,
JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
UNLIMITED JURISDICTION
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| JEROLD DANIEL) FRIEDMAN, also known as) JERRY FRIEDMAN, ) Plaintiff, ) v. ) SOUTHERN CALIFORNIA) PERMANENTE MEDICAL) GROUP, a California) partnership; KAISER) FOUNDATION) HOSPITALS, a California) corporation; KAISER) FOUNDATION HEALTH) PLAN, INC., a California) corporation; KAISER) FOUNDATION ADDED) CHOICE HEALTH PLAN,) INC., a California) corporation; KAISER) FOUNDATION) INTERNATIONAL, a) California corporation;) MACTEMPS, an unknown) business entity; AQUIENT,) an unknown business entity,) doing business as) MACTEMPS; LASER) DESIGNS, Corporation Which Will Do Business in California as MACTEMPS; and DOES 1 through 100, inclusive, Defendants. | **CASE NO. BC224249**<br><br>**DATE:**<br>**JULY 7, 2000**<br>**TIME: 8:30 A.M.**<br>**DEPT.:41**<br>**JUDGE:**<br>**HON. RONALD M. SOHIGIAN**<br><br>**[AMENDED] OPPOSITION TO DEMURRER TO COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT**<br><br>**COMPLAINT FILED:**<br>**FEB. 3, 2000**<br>**TRIAL DATE:**<br>**NOT SET** |

TO THE COURT, TO THE DEFENDANTS, AND TO EACH OF THEM, AND TO THEIR ATTORNEYS, IF ANY:

PLEASE TAKE NOTICE THAT on JULY 7, 2000, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department "41," of the above-captioned Court, or wherever the case may be reassigned, the Plaintiff JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN, will, and hereby does, **oppose** the Demurrer to the Plaintiff's Complaint, and requests that the Demurrer be **overruled.**

However, in the alternative, should any portion of the demurrer be sustained, leave to amend is requested.

This opposition is based upon this notice of opposition, the notice of opposition and points and authorities filed previously on April 14, 2000[1], the accompanying memorandum of points and authorities in opposition to the demurrer, the notice of opposition to the motion to strike set concurrently herewith, the memorandum of points and authorities filed in opposition to that motion to strike, all pleadings and documents on file herein, and upon such other

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[1] The Plaintiff is refiling this Opposition for the convenience of the Court in light of the extensive delay since the filing of the Demurrer and the Opposition to same to the hearing of this Demurrer and the fact that the Department has changed three (3) times during this time. *Additionally, this amended opposition contains certain changes and additions to the original opposition.* When the Demurrer was originally filed, this case was assigned to the Hon. Carol Boas Goodson in Department 75. However, due to Court reassignments in light of the consolidation of the formerly Municipal Court with the Superior Court, the case was administratively transferred by the Court to the Hon. Mel Red Recana in Department 45, where the Opposition was filed. However, the Defendants filed a peremptory challenge to the Hon. Mel Red Recana, and the Demurrer was put off-calendar and transferred to the Courtroom of the Hon. Barbara A. Meiers, in Department 12. Thereafter, the Plaintiff filed a peremptory challenge to the Hon. Barbara A. Meiers, and this case was transferred to this Courtroom of the Hon. Ronald M. Sohigian, Department 41. This current Opposition attached hereto is intended to replace the prior one in total.

and further oral and documentary evidence as may be presented at or before the hearing of this motion.

DATED: June 27, 2000 MYER LAW FIRM
/s/ Scott D. Myer

BY: SCOTT D. MYER, ESQ.
Attorney for Plaintiff,
JEROLD DANIEL FRIEDMAN,
also known as
JERRY FRIEDMAN

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO PORTIONS OF PLAINTIFF'S COMPLAINT**

This memorandum of points and authorities seeks an order denying and overruling the demurrer of the Defendants to the first through ninth causes of action in the Plaintiff's Complaint.

This case is primarily about the Defendants' (sometimes referred to herein as "Kaiser") failure to accommodate the Plaintiff's religious ethical belief of not harming animals that is the Plaintiff's ethical and moral equivalent of his religion. The Plaintiff is an ethical Vegan and was a Computer Technician *working in a non-public, non-health care facility, warehouse* for Kaiser in Downey, as a contract worker, *having absolutely no contact with patients.* After working for *nearly one-year* for Kaiser, Kaiser liked the Plaintiff's work so well that Kaiser offered the Plaintiff an in-house position doing the same work, at the same location, *continuing to also have absolutely no contact with patients.* However, Kaiser required the Plaintiff to undergo a health/vaccination screening.

The Plaintiff has an ethical Vegan belief of not harming animals. When the Plaintiff, a contract worker at Kaiser in April of 1998 refused - for ethical and religious reasons - to

take a mumps vaccination that included material from chicken embryos, his employment contract/work offer with Kaiser was canceled and a full-time work offer was rescinded and he was removed from Kaiser under his contract. The Plaintiff's job was rescinded solely because he refused to take a mumps vaccination which violated his strongly held ethical principles and beliefs, and he suffered severe damages as a result.

The reason that the Plaintiff refused the test because it is grown in chicken embryos, violating his ethical Vegan beliefs, which prohibit the eating, wearing or using of any animal products. According to the Plaintiff's ethical Vegan belief system, egg-laying hens suffer greatly in chicken factory farms, and the use of unborn chickens to culture the mumps vaccine causes further unnecessary deaths of chickens.

Additionally, subsequently the Plaintiff also discovered that a tuberculosis ("TB") test administered to him by Kaiser - which, he had been assured by Kaiser, contained no animal products - did, in fact, include a bovine (cow) serum, negating his consent and leading to a battery. Further, Kaiser's use of the TB test in this matter, violated state law. Said law is to protect people from being unwitting experimental subjects. This portion of the lawsuit alleges that the lawsuit is that the Plaintiff was not fully informed about the medical procedure, as required by law, and alleges that he was made a "medical experiment" under the law.

As a result of the Defendants actions, the Plaintiff has suffered loss of income, pain and suffering, post-traumatic stress disorder, embarrassment, anxiety, humiliation and extreme and severe mental anguish and emotional distress because of his employment termination, and the injection of cow serum, which goes against his ethical Vegan beliefs.

1. **The Plaintiff's Ethical Vegan Beliefs Qualify for the Prohibition on Religious Discrimination Protections:**

The Defendants admit in their memorandum of points and authorities that "Plaintiff . . . pleads the elements of religious discrimination in his Complaint." [Demurrer

Memorandum of Points and Authorities, page 3, lines 24 and 25]. Despite this, they make the unsupported contention that Vegan cannot ever be considered a religion or its equivalent under the anti-discrimination statutes. The Defendants merely cite to Federal cases (we are alleging State Court violations), in other Circuits that are not even on point. In fact the inflammatory references to the KKK cases are disingenuous and not analogous in the least. KKK activities involve illegal activities (which anti-discrimination statutes do not product) compared to the plaintiff's sincere ethical Vegan belief in non-violence to animals of all kinds (which clearly is not illegal and anything but illegal).

Further, contrary to what the Defendants have stated, all forms and aspects of religion, however eccentric, are generally included. *Cooper v. General Dynamics, Convair Aerospace Div.* (5th Cir. 1976) 533 Fed.2d 163, 168-169, *cert denied,* 43 U.S. 908 (1977). Further, a religion does not require a formal organization or a "written form" to be protected by equal employment opportunity laws. [See *Brown v. Dade Christian Schools, Inc.* (5th Cir. 1997) 556 Fed.2d 310, 311-312, cert. denied, 434 U.S. 1063].

Further, the Defendants contention that there needs to be mutual exclusivity among different faiths is not correct–one can be both Jewish and Christian as is shown by the Jews for Jesus faith. The Defendants did not provide any support for this preposterous exclusivity position. In fact, following the Defendants' contention that only "institutional religions" are protected by the *FEHA* (and *Title VII* as well) is not supported by either the case law, nor the Code and Regulations promulgated thereby, as shown below, and is clearly wrong. It should be kept in mind that the various branches of the Protestant Christian churches, such as Methodist, Baptist, Lutheran, Episcopalian, Presbyterian, etc., at one time were *not* considered "institutional religions," with the Roman Catholic Church being the only "institutional" Christian religion, hence the term "Protestant," as in "protest."

A California tax case that set forth a very broad definition of religion and religious beliefs, *Fellowship of Humanity v. County of Alameda* (1957) 153 Cal.App.2d 673, 315 P.2d 394, has even been cited as authority in two U.S. Supreme Court cases. (See *School Dist. v. Schempp* (1963) 374 U.S. 203, 302, 10 L.Ed.2d 844, 903, 83 S.Ct. 1560, 1613, and *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, 6 L.Ed.2d 982, 987, 81 S.Ct. 1680, 1684). This case included "Taoism, classic Buddhism, and Confucianism" as religions. Id., at pp. 684, 690. And also includes "humanists" and others that do not believe in "God or gods." Id., at pp. 680, 687 and 690. This case defined religion primarily in a constitutional setting, and should include the Plaintiff herein's ethical Vegan beliefs. However, the definition of religion in a anti-discrimination setting, such as *FEHA* here, should be broader than that in the constitutional (usually, Establishment Clause) setting in order to serve the differing public policy purpose of eliminating discrimination in the workplace.[2]

Similarly, guidelines issued by the Internal Revenue Service to determine if an organization is organized and operated exclusively for religious purposes focus on a nonsecular definition of religion. The guidelines posit two basic questions: 1) Are the organization's beliefs truly and sincerely held by those professing them, as opposed to a mere sham, and 2) Are the practices and rites associated with the organization's belief or creed illegal or contrary to clearly defined public policy. If beliefs are truly and sincerely held,

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[2] In fact, the use of the term "creed" in addition to "belief or observance" or merely "religion" in the anti-discrimination *FEHA* statute could connote an intended broader interpretation for religion. See as an example the difference between *Government Code* §12940(a) using term "religious creed" as opposed to *Government Code* §12940(j) using term "religious belief or observance." Note also the broad definition in *Government Code* §12940(o), using terms "religious creed," "religion," "religious observance," "religious belief," and "creed" to include "all aspects" of same.

and practices do not violate law or clearly defined public policy, the Service will not question the religious nature of the organization's beliefs. [*Internal Revenue Service Code* § [7.8.1] 3.3.2 (1999)].

Neither of the cases cited by the Defendants are applicable in the situation at bar. In fact, the analogies illustrate the same discriminatory perspective that Plaintiff's religious beliefs were afforded. The Court in *Brown v. Pena*, F.Supp. 1382, 1384 (S.D.Fla. 1977), *aff'd* 589 F.2d 1113 (5th Cir. 1979), in an out of state, out of Circuit, decision, denied a prisoner's religious discrimination claim regarding his personal belief that eating cat food contributed to his well being. The Court found unique personnel preferences do not constitute a "religious belief." However, Veganism extends beyond trivial dietary preferences. Diet is merely a small part of observing a non-exploitive relationship with the people and animals of this world. Veganism is a relational "lense" through which to view the world. Vegans are not "speciesist" and value the sanctity of all life, seeking to exclude from their life, as far as possible and practical, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose. Consequently, Vegans do not eat meat, fish or poultry, and do not use other animal products and by-products including eggs, dairy products, honey, leather, fur, wool, soaps and toothpastes which contain lard, etc., and Vegans do not participate in the biomedical experimentation on animals and avoid activities or products which encourage it. As can be seen by this "list" of prohibited activities, being vegetarian is only one small part of being a Vegan. A recent poll estimates there are a half million Vegans in the continental United States.[3] There is a common ethical principle shared by all

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[3] A 1994 poll conducted by the Vegetarian Resource Group of 1,978 men and women reflects an estimated 500,000 Vegans in the United States. Debra Wasserman & Reed Mangels, *Vegan Handbook* at 229-230 (1996). As an aside, actress Alicia Silverstone recently stated on the NBC Television Network *Jay*

Vegans which is a reverence for life and desire to live with, as opposed to depend upon, the others species of the planet. Veganism is therefore not some bizarre trivial personal belief, but is a sincerely held set of moral and ethical values that rise to the level religious beliefs, and should be afforded religious protections as such.

**A. Religious Discrimination Prohibitions In General:**

Both *Title VII* of the *Civil Rights Act of 1964* and the *California Fair Employment and Housing Act, California Government Code* §12900, et seq. (hereinafter referred to as "*FEHA*") prohibit employment discrimination based on religion [see 42 *U.S.C.* § 2000e-2(a) *(Title VII)*; California Government Code §12940(a)-(d), (i), (j) *(FEHA)*]. Not only is religious discrimination in hiring, firing, compensation, and the terms, conditions, and privileges of employment unlawful [42 *U.S.C.* §2000e-2(a) *(Title VII)*; *Gov. Code* §12940(a) *(FEHA)*], but there is an affirmative duty on the employer to accommodate an individual's religious beliefs or observances [42 U.S.C. §2000e(j) *(Title VII)*; *Gov. Code* §12940(j) *(FEHA)*]. In this case, Plaintiff has sued herein under *FEHA*.

**B. Definition of Religion Under *FEHA*:**

"Religious creed," as it is used in the *FEHA*, not only includes any traditionally recognized religion, but also includes beliefs, observances, or practices that an individual sincerely holds and that occupy in his or her life a place of importance parallel to that of traditionally recognized religions. See 2 *Cal. Code Reg.* §7293.1, a copy attached for the Court's convenience as Exhibit "A."

*California Government Code* §12926(o), defines the religion terms as meaning that "'Religious creed,' 'religion,' 'religious observance,' 'religious belief, and 'creed' include all aspects of religious belief, observance, and practice." *California Government Code* §12935, regarding the "Functions, powers and

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*Leno Show* that she was Vegan.

duties of commission," provides that "The commission shall have the following functions, powers, and duties: (a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (3) to carry out all other functions and duties of the commission pursuant to this part."

Pursuant to this authority, the Commission has defined "religious creed." 2 *Cal. Code Reg.* §7293.1, (attached as Exhibit "A" hereto), regarding "Establishing Religious Creed Discrimination," states, emphasis added, that "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions. . . ."* 2 *Cal. Code Reg.* §7293.3 likewise requires employers to "make reasonable accommodation to the known religious creed of an applicant or employee." A copy of this regulation is attached hereto as Exhibit "B" for the Court's convenience. Even the under federal regulations, "religious practices" include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views [See 29 C.F.R. §1605.1, a copy attached as Exhibit "C" for the Court's convenience]. This regulation has even been used to show that even if no religious group espouses such beliefs, the belief can still be a religious belief of the employee or prospective employee, which would appear equally applicable under *FEHA*.

Clearly, under the regulatory definition, the Plaintiff beliefs about ethical Veganism qualify as "religious creed." The Plaintiff has plead that he "holds these beliefs with the strength of traditional religious views. . ." [Complaint, page 2, line 24], and that "These are sincere and meaningful beliefs which occupy a place in the Plaintiff's life parallel to that filled by God in traditionally religious individuals adhering to the

Christian, Jewish or Muslim Faiths" [Complaint, page 2, line 28, to page 3, line 2].

2 *Cal. Code Reg.* §7293.1, continues by saying that "Religious creed discrimination may be established by showing: (a) Employment benefits have been denied, in whole or in part, because of an applicant's or employee's religious creed or lack of religious creed [or] (b) The employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation."

Thus it is clear that the Plaintiff's ethical Vegan beliefs are protected under the anti-discrimination statutes protecting religious beliefs and creed. Even if the Court should find that Veganism is not a religion for all that practice it, the form of ethical Vegan beliefs and practices of the Plaintiff do qualifies as religious beliefs and creed under *FEHA*.

**2. <u>Plaintiff's Tort Claims are NOT Preempted Because the Conduct of the Defendants Does Not Reasonably Come Within the "Compensation Bargain"</u>:**

The Defendants contend that the Plaintiff's causes of action for battery[4], invasion of privacy, negligence, battery/negligence per se for failure to obtain consent to medical experimentation, and intentional and negligent infliction of emotional distress are allegedly barred under the *California Workers' Compensation Act, California Labor Code* §§

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[4] Defendants state in their points and authorities that "health care providers are required by law to conduct tuberculosis testing on certain employees . . . and that Kaiser has adopted a policy requiring all employees to submit to health appraisals, including tuberculosis testing." [Demurrer memorandum of points and authorities, page 8, lines 4 to 8, inclusive.] However, it should be noted here that neither the administrative code they cited 22 Cal. Admin. Code §70723(b), nor any other statute, code or regulation, requires that the Plaintiff a *non-health care* employee, who did *not* work in a health care facility, from being tested, *nor for that matter is there any requirement in statute, code or regulation requiring Kaiser to immunize their employees.*

3600, *et seq.* However, the Defendants have failed to note that workers' compensation does *not* preempt an employee's claim for physical or emotional injury to which workers' compensation applies if there is an express exemption, the injury is the result of conduct that does not reasonably come within the "compensation bargain," the injury is a result of conduct that "contravenes fundamental public policy," or the employee is not an employee at the time when the actionable conduct arises.

While the Defendants do not appear to be contending that workers' compensation would preempt the Plaintiff's *FEHA* claims, it should be noted that because statutorily prohibited discrimination is not a normal incident of employment, workers' compensation does *not* preempt claims brought under the *FEHA*. See *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 353, 21 Cal.Rptr.2d 292. And since *Accardi* held that emotional distress claims caused by the employer's discriminatory practices are *not* barred by workers' compensation, clearly the Plaintiff's eighth and ninth causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress, which both incorporate the prior causes of action, including the first cause of action for *FEHA* discrimination, the second cause of action for *FEHA* failure to maintain discrimination-free workplace and the third cause of action for *FEHA* retaliation, are not barred by workers' compensation. [See also *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 77 Cal.Rptr.2d 445, which held that *FEHA* claim for disability discrimination is *not* preempted by workers' compensation.] Likewise, the fifth cause of action for invasion of privacy, which is in part based upon the incorporation of these same *FEHA* allegations, should also not be preempted.

Additionally, the invasion of privacy cause of action, i.e., the fifth cause of action, is based primarily upon the "Plaintiff['s] right of privacy under the *United States Constitution*, [and] the *California Constitution*, Article 1, Section

1." [See Complaint, page 15, ¶81, lines 23 and 24]. As such an invasion of the Plaintiff right of privacy would be the result of conduct that "contravenes fundamental public policy." According to *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754, 7 Cal.Rptr.2d 808, injury that is the result of conduct that "contravenes fundamental public policy" is *not* preempted by workers' compensation. Likewise, violation of *California Heath and Safety Code* §§ 24170, *et seq.*, including §24175(a), §24173, §11525 and §11530, which requires the consent of all human subjects before medical experimentation can be performed on such human subjects, would "contravene fundamental public policy," and should therefore *not* be preempted by workers' compensation.

Further, injury that is a result of conduct that does not reasonably come within the "compensation bargain" does *not* preempt an employee's claims for physical or emotional injury. [See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 276 Cal.Rptr. 303].

**3. Plaintiff has set forth the Allegations for a Human Medical Experimentation Cause of Action:**

There is no statute, code or regulation that requires Kaiser to test the Plaintiff who is *not* a health care employee and who does not work in a "health care facility." Further, there is no statute, code or regulation that requires Kaiser to immunize any of their employees. Therefore, Kaiser's procedures, *when not involving proper informed consent*, amounts to a Human Medical Experiment in violation of *California Health & Safety Code* §24170, et seq., as set forth in the Plaintiff's Seventh Cause of Action. [See *Health & Safety Code* §§ 24174 and 24176]. Kaiser appears to have admitted that they are attempting to use this to determine whether it is the best procedure to keep healthy its health care employees. Further, while the Plaintiff never received the vaccination, he did receive the screening test that was a part of the procedure, and hence was made a part of the medical experiment.

**4. The Demurrer Should Be Overruled; However, to the Extent that it is Sustained, Leave to Amend is Requested:**

Although the Plaintiff believes that the Demurrer should be overruled and denied in its entirety, should the Plaintiff be mistaken and should the Court sustain the Demurrer in any respect, leave to amend is hereby requested. "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." [*Angie M. v. Sup.Ct. (Hiemstra)* (1995) 37 Cal.App.4th 1217, 1227, 44 Cal.Rptr.2d 197, 204]. In fact, it has been held to be an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 384; *Okun v. Sup.Ct. (Maple Properties)* (1981) 29 Cal.3d 442, 460, 175 Cal.Rptr. 157, 168]. Inasmuch as the complaint at issue is the *original* Complaint, leave should be granted in such an event.

**5. CONCLUSION:**

Therefore, for the foregoing reasons and the other reasons mentioned during oral arguments, the Defendants' Demurrer should be **overruled and denied.** However, should the Demurrer be sustained or granted in any respect for any reason, leave to amend is hereby requested.

DATED: June 27, 2000

MYER LAW FIRM
/s/ Scott D. Myer

BY: SCOTT D. MYER, ESQ.
Attorney for Plaintiff,
JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN

**ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL**
**[Code Civ. Proc. § 1013a(2) ]**

I, SCOTT D. MYER, certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Myer Law Firm, 11040 Santa Monica Boulevard, Suite 320, Los Angeles, CA 90025-7515.

I served the attached **[AMENDED] OPPOSITION TO DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO COMPLAINT**, on June 27, 2000, by depositing a copy of the document in the United States mail at City of Los Angeles, County of Los Angeles, State of California, in a sealed envelope, with postage fully prepaid, **[ ] EXPRESS MAIL; [-X-] PRIORITY MAIL; [ ] Regular Mail,** addressed to:

**Ms. Debbie Freedman**
**SEYFARTH SHAW**
**2029 Century Park East, Suite 3300**
**Los Angeles CA 90067-3063**

who is the attorney of record for the Plaintiffs in the above-entitled cause. At that time there was regular delivery of United States mail between the place of deposit and place of address.

Dated: June 27, 2000

/s/ Scott D. Myer
SCOTT D. MYER, ESQ.